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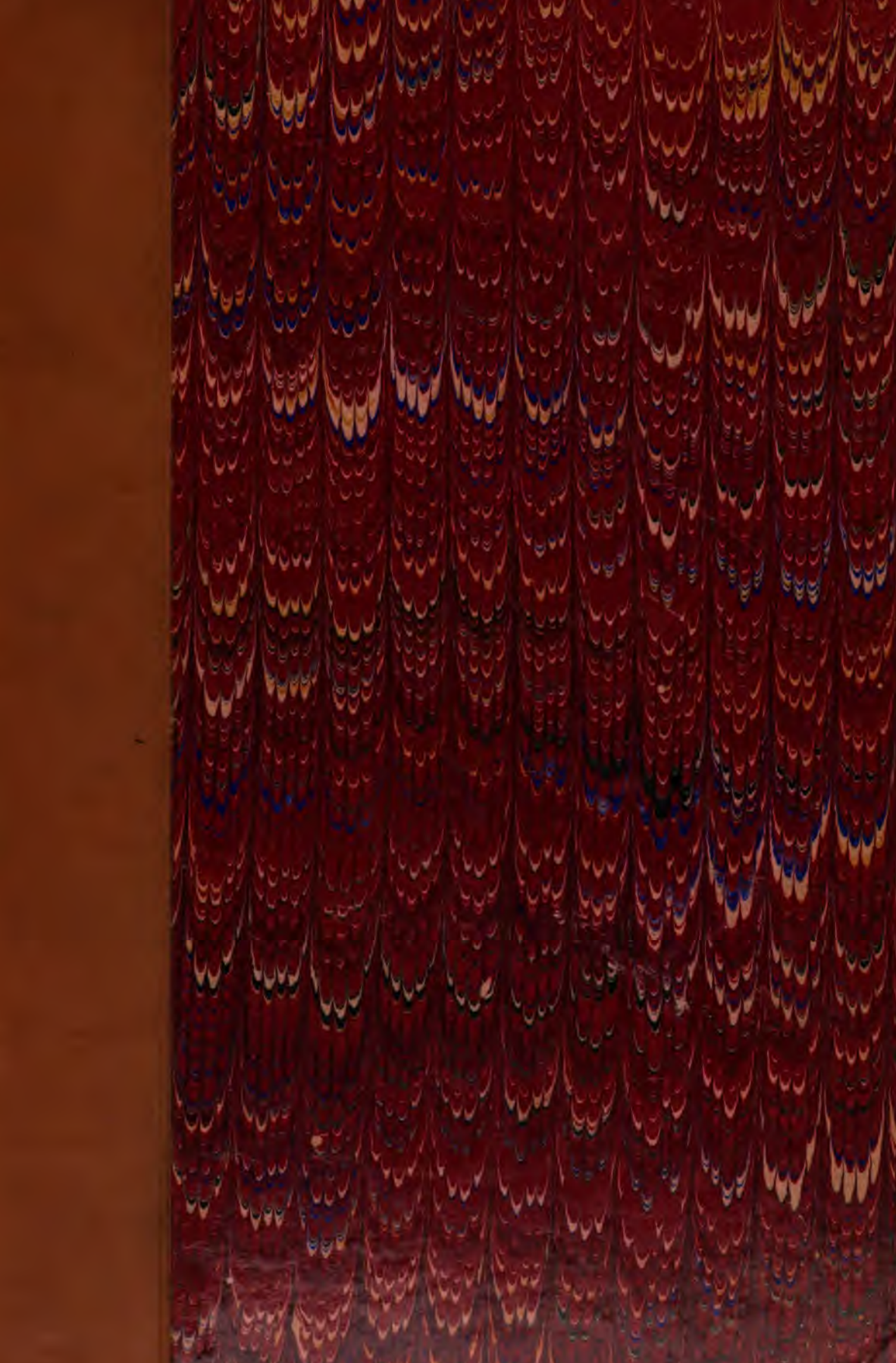

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CANADIAN CRIMINAL CASES ANNOTATED

A Series of Reports of Important Decisions in Criminal and Quasi-Criminal Cases in Canada under the Laws of the Dominion and of the provinces thereof, with special reference to Decisions under the Criminal Code of Canada, 1892, in all the Provinces; with Annotations, a Table of Cases Cited and a Digest of the Principal Matters.

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CORRIGENDA.

Page 189, last line, add—"But see sec. 999 of Revised Code in cases since January, 1907."
Page 297, line 2—For "sec. 619" read "sec. 916."
Page 299, last line—For "sec. 268" read "sec. 298."
Page 300, head note 5, after the word "indictment" insert "for an attempt."

Canadian Criminal Cases.

Reports of Cases in Criminal and Quasi-Criminal matters decided in the Courts of Canada and of the Provinces thereof.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE THE HONORABLE CHIEF JUSTICE SIR ROBERT L. WEATHERBE, KT., IN CHAMBERS.

THE KING v. HOARE.

Subsequent offence—Proving prior conviction—Evidence that last offence was after information laid for prior offence—Magistrate's certificate—Canada Temperance Act, sec. 115.

1. The fact that information was duly laid for the prior offence must be proved in a charge as for a second or third offence under the Canada Temperance Act, where the increased penalty is to be imposed.
2. The information for the prior offence is not legally proved by the oral testimony of the solicitor acting for the informant on the trial of that charge, whose knowledge of the laying of the information and of the date of same was obtained only by inspection thereof at such trial.
3. The date of the information for the prior offence is not provable by including a statement thereof in a certificate of the magistrate issued under sec. 115(b) certifying the number of previous convictions.

ARGUED: January 2 and 3, 1907.
DECIDED: January 11, 1907.

MOTION on notice to the convicting magistrate and prosecutor, under ch. 181 of the Revised Statutes of Nova Scotia, "Of the Liberty of the Subject," on the return of an order in the nature of a writ of *habeas corpus,* and an order to produce the record, under sec. 7 of that statute, for the discharge of David Hoare, a prisoner confined in the common gaol at Pictou, in the county of Pictou, under a warrant of commitment, issued on a conviction made against the defendant on December 10th, 1906,

by the stipendiary magistrate for the town of Stellarton, in the county of Pictou, for the offence of having unlawfully kept intoxicating liquor for sale, between the tenth day of July, 1906, and the ninth day of October, 1906, at said town of Stellarton, in said county of Pictou, contrary to the provisions of the second part of the Canada Temperance Act, then in force in and throughout the said county of Pictou, and for which he was adjudged to be imprisoned in the common gaol at Pictou, for a term of three months. The conviction recited a previous *second* conviction of the prisoner of July 3rd, 1906, for unlawfully keeping intoxicating liquor for sale, between the 31st day of March, 1906, and the 19th day of June, 1906, at the said town of Stellarton, and also a previous *first* conviction of February 19th, 1906, for unlawfully selling intoxicating liquor, between the 1st day of November, 1905, and the 24th day of January, 1906, at the said town of Stellarton, both prior convictions having been before two other justices of the peace, for the county of Pictou.

The magistrate's record disclosed that the previous convictions and the informations on which they were based, was proved only by the following evidence.

> The deponent William MacDonald on his oath saith as follows:—Tenders certificate of conviction for second offence. Marked R. G. M. A. (Objected to). I was present at trial. Represented prosecution. The information in that case was laid June 19th last. The defendant in that case is the same man as the defendant in the present case. Tenders certificate of conviction for first offence. Marked R. G. M.B. (Objected to). I was present as solicitor on that occasion. Information was laid on January 24th last. The defendant in that case certified to have been convicted by the justices is the same man as in the present case. The defendant convicted on the 19th day of February last and on the 3rd day of July last, as in the certificates tendered is the same man who is here to-day and convicted of the offence first charged in the information.

(Cross-examined by Mr. Maddin.) "John Gollan and Wm. MacLaren were not both subpoenaed. I was prosecuting solicitor in both of those cases, and also in this case. Was paid or expect to be paid for work in former cases. I subpoenaed Gollan and paid him his fees."

The certificates to prove the number of previous convictions were as follows:

EXHIBIT R. G. M: A.

Canada.
Province of Nova Scotia.
County of Pictou, to wit:

We, John Gollan and William MacLaren, of Pictou, in the county of Pictou, Esquires, do hereby certify that David Hoare, of the town of Stellarton, in said county of Pictou, saloon-keeper, was duly convicted before us, the undersigned, two of His Majesty's justices of the peace, in and for the said county of Pictou, at Pictou in the said county of Pictou, on the 3rd day of July, A.D. 1906, of a second offence against the provisions of the second part of the Canada Temperance Act, then in force in and throughout the said county of Pictou, to wit; of having unlawfully kept intoxicating liquor for sale at said town of Stellarton, in said county of Pictou, between the thirty-first day of March, A.D. 1906, and the nineteenth day of June, A.D. 1906: said conviction having been made on information laid before us at Pictou aforesaid on the nineteenth day of June, A.D. 1906.

Dated at Pictou, in the county of Pictou, this nineteenth day of November, A.D. 1906.

(Sgd.) "JOHN GOLLAN" (L.S.)
Justice of the peace in and
for the county of Pictou.

(Sgd.) "WM. MACLAREN" (L.S.)
Justice of the peace in and
for the county of Pictou.

EXHIBIT R. G. M.: B.

Canada.

Province of Nova Scotia.

County of Pictou, to wit:

We, John Gollan and William MacLaren, of Pictou, in the county of Pictou, Esquires, do hereby certify that David Hoare, of the town of Stellarton, in the said county of Pictou, saloon-keeper, was duly convicted before us, the undersigned two of His Majesty's justices of the peace, in and for the said county of Pictou, at Pictou, in the said county of Pictou, on the nineteenth day of February, A.D. 1906, of a first offence against the provisions of the second part of the Canada Temperance Act, then in force in and throughout the said county of Pictou, to wit: of having unlawfully sold intoxicating liquor at said town of Stellarton, in said county of Pictou, between the first day of November, A.D. 1905, and the twenty-fourth day of January, A.D. 1906, said conviction being made on information laid before us, at Pictou aforesaid, on the twenty-fourth day of January, A.D. 1906.

Dated at Pictou, in the county of Pictou, this nineteenth day of November, A.D. 1906.

(Sgd.) "JOHN GOLLAN" (L.S.)
Justice of the peace in and
for the county of Pictou.

(Sgd.) "WM. MACLAREN" (L.S.)
Justice of the peace in and
for the county of Pictou.

Sub-sections (*b*) and (*d*) of sec. 115 of the Canada Temperance Act, are as follows:—

115(*b*) The number of such previous convictions shall be provable by the production of a certificate under the hand of the

convicting justice, or magistrate, or officer, or of the clerk of the peace, without proof of his signature, or official character, or by other satisfactory evidence.

115(*d*) Convictions for several offences, may be made under this Act, although such offences have been committed on the same day; but the increased penalty or punishment hereinbefore imposed, shall only be recoverable or liable to be imposed, in the case of offences, committed on different days and after information laid for a first offence.

The prisoner's discharge was moved for on the ground that there was no evidence before the stipendiary magistrate that the information on which the convictions for the first and second offences were founded were laid before the commission of the offence, charged as a third offence, or that any information for said prior convictions were ever laid so as to give the justices making the convictions based on them jurisdiction to so act.

HALIFAX, N.S., January 9 and 10, 1907.

John J. Power, for the prisoner.

W. B. A. Ritchie, K.C., and *William MacDonald,* for the prosecutor.

HALIFAX, N.S., January 11, 1907.

SIR ROBERT L. WEATHERBE, Kt. C.J.:—Section 115(*d*) of the Canada Temperance Act, provides for making convictions for several offences on the same day, provided the increased penalty shall be for offences on different days and after information laid for a first offence.

Literally construed, no doubt in such latter case no increased penalty could be recovered without proof of the information.

In the same section (*b*) provision is made for proving the "number of such previous convictions," by the production of a certificate, but no such convenient method of proving the "in-

formation" which in fact may be laid before a different magistrate is provided. Therefore the question here is whether some person who may have read the information can come before the justice and verbally prove such document which is the case before me. I think this is not legal proof, and as a matter of course no authority for it could be shewn.

In New Brunswick it was decided by a strong Court, Sir John Allan, Palmer, King, and Fraser, JJ., under this same clause that such information cannot be proved even by the magistrate's certificate of the previous conviction. *Ex parte Edgar*, 31 N.B.R. 139.

What I suppose was chiefly relied on by the prosecution, was that this matter cannot be enquired into and that this is not an objection that goes to the jurisdiction, but I think it is a question in the words of King, J., in *R.* v. *Troop*, 29 Can. S.C.R. 673, collateral to the merits and upon which the limit to jurisdiction depends.

I have gone through the numerous cases cited, most of which have already been frequently discussed in this Court, and I would willingly go fully into them now if any good result would follow. The prisoner must be discharged.

Order for prisoner's discharge with protection to gaoler.

Note: *Proof of previous summary conviction—Cr. Code sec.* 694. *—Revised Code* (1906) *sec.* 982.

The date of the information upon which a conviction is based may properly be included in the conviction itself although it is no longer essential for the purpose of upholding the conviction.

A previous conviction may be proved (*a*) by the production from the proper custody of the conviction itself, or (*b*) by a copy of the conviction certified by the clerk of the peace or other officer having charge of the records of same. *R.* v. *Yeoveley* (1838), 8 A. & E. 806; *R.* v. *Ward* (1834), 6 C. & P. 366.

If the certificate or exemplification be that of a Court having a seal it must be certified under such seal; if the proceedings to be certified be before a justice of the peace or coroner, the pro-

Note:—*Continued.*

Proof of previous summary conviction—Cr. Code sec. 694 *—Revised Code* (1906) *sec.* 982.

ceeding may be certified under the hand or seal of such justice or coroner; and, if any such Court, justice or coroner has no seal, or so certifies, then a copy purporting to be certified under the signature of a judge or presiding magistrate of such Court or of such justice or coroner is admissible without any proof of the authenticity of such signature or other proof whatsoever. Canada Evidence Act, 1893, sec. 10.

And now by Code sec. 694, a copy of any summary conviction, purporting to be signed by the clerk of the Court or other officer having the custody of the records of the Court to which such summary conviction was returned, or by the deputy of such clerk or officer, shall, upon proof of the identity of the person of the offender, be sufficient evidence of such conviction without proof of the signature or official character of the person appearing to have signed the same.

The question whether the defendant had been previously convicted or not is within the jurisdiction of the magistrate, and his finding thereon on competent evidence is conclusive. *R.* v. *Brown*, 16 Ont. R. 41.

It is said that where no particular circumstance tends to raise a question as to the party being the same, even identity of name is in civil cases something from which an inference of identity may be drawn in proof of a signature to a document, but that, in a criminal case, the mere fact that a person of the same name as the prisoner signed a document, or the like, would not be considered sufficient. Russell on Crimes, 6th ed. (1896), vol. 3, 470(*n*).

In the Irish case of *R.* v. *Ellen Murtagh* (1854), 6 Cox C.C. 447, the prisoner was indicted for a misdemeanor in making a false declaration before a magistrate. The magistrate, who had taken the declaration, and a clerk from the police office, were examined, and proved that the declaration produced was made by a woman describing herself as Ellen Murtagh, and who signed by making her mark to it, but were unable to identify the prisoner. It was attempted to prove identity by means of alleged admissions in prisoner's examination upon a subsequent statutory inquiry under oath, but such being held inadmissible it was held there was no evidence to support the indictment.

Note:—*Continued.*

Proof of previous summary conviction—Cr. Code sec. 694 *—Revised Code* (1906) *sec.* 982.

A defendant in a criminal case tendering himself as a witness on his own behalf is subject on cross-examination to be questioned as to whether he has been convicted of any offence, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction; and a certificate under Code sec, 694 will upon proof of the identity of the witness as such convict, be sufficient evidence of his conviction, without proof of the signature or the official character of the person appearing to have signed the certificate. Code sec. 695; Phipson on Evidence, 2nd ed. 164.

A witness may be cross-examined as to whether he has been convicted of any offence, *i.e.*, a criminal offence. If he denies it or refuses to answer the cross-examining party may prove such conviction as affecting his credit although the fact of the conviction may be wholly irrelevant to the issue. *Ward* v. *Sinfield,* 49 L.J.C.P. 696.

[COURT OF KING'S BENCH, QUEBEC.]

BEFORE LEMIEUX, J.

THE KING v. MOLLEUR (No. 1).

Defamatory libel — Evidence — Extrinsic circumstances — Particulars — Revised Code secs. 329, 859.

1. When an indictment for defamatory libel consisting of words harmless in themselves, but importing by innuendo an imputation of dishonourable conduct contains in addition to the enunciation of the incriminating words an allegation of the sense in which they should be understood the Crown will be allowed to prove extrinsic circumstances which impute this meaning to them. It is not necessary to enumerate these circumstances in the indictment, and the accused is sufficiently guarded against surprise by the right that he has to demand particulars. Failing to do so, he will not be allowed to object to the admission of the evidence above mentioned and the question of its legality is not one which can be reserved for the opinion of the Court of Appeal.

2. When the accused in a case of defamatory libel in a newspaper resorts to the defence allowed by the Revised Criminal Code sec. 329 (1892 Code sec. 297) that the publication of the libel was made without his knowledge, the Crown may prove the publication of former libels of a similar character by the same editor, in order to establish the liability of the accused resulting by the terms of article 297 by his continuing to retain this editor in the conduct of the newspaper.

ST. JEAN D'IBERVILLE, November 15, 1905.

(Translation.)

LEMIEUX, J.:—A verdict of guilty was rendered against the accused persons for defamatory libel, published in the number of the 21st August, 1903, of the newspaper "Le Courrier de St. Jean," against J. A. Benoit, who was accused in the newspaper of being "the protector of childless widows," that is to say, of being a seducer and a robber of childless widows, as more fully enunciated in the deed of accusation.

In the course of the proceedings the Crown had witnesses heard, in spite of the objection of the defence, dismissed by the Court, to establish that the words "protector of childless widows" meant that the said Benoit was a seducer and a robber of childless widows.

The Court allowed this evidence, considering the fact that the deed of accusation alleged specially that the words published in the "Courrier de St. Jean," that is to say "protector of childless widows," said and meant to say that Benoit was a seducer and a robber of childless widows.

The Crown also had witnesses heard, also in spite of the objection of the defence, dismissed by the Court, to shew the reasons and the particular circumstances which led, or induced them to understand that the words "protector of childless widows" meant seducer and robber of childless widows.

The objection of the defence rested on the ground that the deed of accusation did not specify the extrinsic circumstances relating to the words objected to, and did not give any innuendo which could justify the interpretation given by the witnesses.

In substance, the witnesses said that their reason for believing that these words meant seducer and robber of widows, is, that there was a rumour in the parish of St. Grégorie to the effect that the said Benoit had illicit relations with a widow without children. The witnesses added that the publication of the words "protector of widows without orphans" was a direct allusion to this rumour, and was of a nature to countenance and accredit, and had countenanced and accredited, this rumour.

The defence moved to reserve for the consideration of the Court of Appeal for reserved cases, the question whether the evidence given by the Crown to establish "the particular meaning of the words, protector of widows without orphans," was admissible, without allegation in the deed of accusation, of the particular meaning of these words in relation to the said Benoit, and the extrinsic circumstances which would impute to these words the meaning seducer and robber of childless widows.

Is this question which we have been asked to reserve for the consideration of the Court of Appeal, so complicated that according to law it admits of any doubt, and does the statute governing the matter permit us to give a peremptory reply to the application of the accused?

We are authorized by sec. 615 of the Criminal Code to allow the Crown to present evidence of circumstances which had induced the witnesses to understand that the incriminatory words published in the article had the meaning ascribed to them by the indictment, although the indictment did not set out these circumstances or contain the innuendo from the words.

This article 615 is as follows:

"Aucun chef d'accusation pour publication d'un libelle blasphématoire, séditieux, obscène ou diffamatoire, ou pour vente ou exposition d'un livre, pamphlet, journal ou autre matière imprimée ou écrite d'une nature obscène, ne sera réputé insuffisant par e qu'ill n'en citerait pas les paroles; néanmoins, la Cour pourra ordonner que le poursuivant fournisse un exposé précis

des passages de ce livre, pamphlet, journal ou autre écrit sur lesquels il s'appuie pour formuler l'accusation.

(2) Uu chef d'accusation de libelle peut porter que la chose publiée a été écrite dans un sens qui en rend la publication criminelle, en spécifiant ce sens, sans affirmation préliminaire indiquant comment la chose a été écrite dans ce sens. Et lors du procès, il suffira de prouver que la chose publiée était criminelle avec, ou sans, cette insinuation."

The English version is as follows, sub-sec. 2 of which seems to be more expressive:

"No count for publishing a blasphemous, seditious, obscene or defamatory libel or for selling or exhibiting an obscene book, pamphlet, newspaper or other printed or written matter shall be deemed insufficient on the ground that it does not set out the words thereof; provided that the Court may order that a particular shall be furnished by the prosecutor stating what passages in such book, pamphlet, newspaper, printing or writing are relied on in support of the charge.

"(2) A count for libel may charge that the matter published was written in a sense which would make the publishing criminal, specifying that sense without any preparatory averment, shewing how that matter was written in that sense. And on the trial it shall be sufficient to prove that the matter published was criminal either with or without such innuendo."

So then, the simple reading of the statute leads us to the inevitable conclusion that it suffices in the case of defamatory libel consisting of covert words or terms, or those with a double meaning, or an insinuation, to allege in the indictment as has been done in the present instance, that the words import, or are intended to import something injurious to the reputation of anyone in exposing him to hatred, contempt, or ridicule, or are calculated to insult the person against whom they are published. In every case under the statute it is sufficient to specify in the indictment the sense of the alleged defamatory and libellous

words, "without any affirmative preliminary indicating why and how the matter was written in such sense."

This is the case in respect to accusations which impute a false pretext, a fraud or an attempt to do something or to engage in a plot by fraudulent means. In such case it is not necessary to express in detail in what the false pretext the fraud, or the fraudulent means consist (see sub-sec. 2 of sec. 616). The law in such case, whether it be murder, deceit, theft, etc., does not require to make the indictment valid, that the circumstances under which the crime was committed should be set out, nor any allegation of why, or how the crime happened.

Parliament has in all such cases laid down a rule which the law and the Courts recognize, a prudent rule, that there shall be furnished to the accused before he pleads to the indictment, for the complete preparation of his defence, if he so demands, particulars or a particular in matter of libel, of the injurious or incriminatory writing, as provided in article 615, or of facts and circumstances upon which the prosecution relies to establish the charge.

The accused have not made any such demand for particulars. They then think themselves sufficiently informed by the indictment of what the libel is.

Now under this indictment the Crown had the incontestable right to prove the innuendo or any circumstances which had led the witnesses to believe that the article meant or was intended to mean that Benoit was a seducer and robber of childless widows.

This indictment moreover entirely conforms to the forms given in our law books as to libel. That was the opinion that we entertained at the trial and the arguments of the learned counsel on the present motion have not modified it.

The defence relies upon a second ground to obtain a reserved case. They claim that in course of the trial the Crown has given evidence of alleged defamatory libel other than that charged in the indictment, as having been published by the accused, espe-

cially the case of three witnesses heard, namely, the witnesses Demers, Gosselin and Mayrand, and that in face of the objections of the accused which were not given effect to by the Court. And I am asked to reserve for the consideration of the Court of Appeal the question whether the proof of these other defamatory libels supposed to have been committed by the accused, outside of that charged in the indictment, should be admitted.

The Crown has proved without any attempt at contradiction on the part of the accused Molleur, that he was proprietor of the newspaper "Le Courrier de St. Jean" at the time of the defamatory libel, and that the defamatory writing was published at the date mentioned in the indictment.

If the words of the writing were defamatory, and if they were published and constituted a libel, Molleur becomes criminally liable for the same; that is the logical and inevitable conclusion.

To obtain his freedom and establish his innocence before the jury, Molleur relied on article 297 of the Criminal Code which is as follows:

"Every proprietor of any newspaper is presumed to be criminally responsible for defamatory matter inserted and published therein, but such presumption may be rebutted by proof that the particular defamatory matter was inserted in such newspaper without such proprietor's cognizance, and without negligence on his part.

"(2) General authority given to the person actually inserting such defamatory matter to manage or conduct, as editor or otherwise, such newspaper, and to insert therein what he in his discretion thinks fit, shall not be negligence within this section unless it be proved that the proprietor, when originally giving such general authority, meant that it should extend to inserting and publishing defamatory matter, or contained such general authority knowing that it had been exercised by inserting defamatory matter in any number or part of such newspaper."

According to this clause to escape conviction it is necessary

for Molleur to fulfil two conditions, first, to prove that the defamatory matter was inserted in the newspaper without his knowledge, and secondly, that it was without negligence on his part.

In fact Molleur, testifying on his own behalf, sought to prove that the publication of the article was made without his knowledge and during his absence from the town of St. Jean. And he also testified to the fact that he had given instructions to his printer not to publish injurious articles.

His evidence as to his absence was not corroborated. That part of his testimony, to the effect that he had given instructions not to publish injurious articles, was corroborated.

Then the Crown wished to prove or attempted to prove that supposing he was absent at the time of the publication, he was none the less liable in view of his negligence, and that such negligence consisted in his having engaged or employed the other accused, Doré, as editor of his newspaper, the "Courrier de St. Jean," and that in engaging or retaining him as editor he had given him power to insert or to publish any defamatory matter in his newspaper, and that in fact Doré in exercising his duties as editor, had inserted, to the knowledge of Molleur, a number of defamatory libels in the issues of this newspaper.

In other words, the theory of the Crown was that Molleur had given general authority to Doré to publish libels, and that this general authority, followed by action, constituted on the part of Molleur, a latent and permanent negligence in the publication of defamatory articles in his newspaper.

If it is true that the "Courrier de St. Jean" frequently published defamatory libels written by the editor Doré, under the inspection and with the knowledge of Molleur, that state of things constituted, in the sense of article 297, negligence on the part of Molleur in the publication of his newspaper, and in the suppression of the publication of libels, and such negligence can clearly be proved to establish the liability of Molleur, notwithstanding his absence at the time of the publication.

Thus we have permitted questions tending to prove negligence or the attempt on the part of the Crown to give such proof.

We do not say that the Crown has conclusively proved such negligence, and no more do we say that it has established that other libels were published by Doré, and that the latter had a general authority to publish them. We expressed our views on this subject to the jury, who did not agree with them. But that is not the question.

The question for decision is whether or not the Crown could make, or could be allowed to attempt to make, such proof of negligence. Having decided in the affirmative in the course of the trial, after explaining to the jury the law governing the matter, it was entirely, or almost entirely, reduced to a simple question of fact which the jury alone had the right to consider and determine.

As to the second point, there is no ground in our opinion to reserve this question for the consideration of the Court of Appeal.

Questions reserved should only be those on points of law, and then only when the Judge entertains a doubt on such points. Now the consideration and careful examination of this question confirms us in the opinion which we expressed at the trial, namely, that there is no doubt on the matter. For these reasons, the application of the accused for a case reserved should be dismissed.

Application refused.

P. A. Chassé, K.C., and *A. D. Girard*, for the prosecution.
F. J. Bisaillon, K.C., for the defence.

NOTE: See the following case, *The King* v. *Molleur* (No. 2).

[COURT OF KING'S BENCH, QUEBEC.]

BEFORE LEMIEUX, J.

THE KING v. MOLLEUR (No. 2.)

Criminal libel—Newspaper — Publication in proprietor's absence—Jury trial—Weight of evidence—Evidence of accused—Corroboration—New trial — Leave to apply—Revised Cr. Code sec. 1021.

1. Leave to apply to the Court of Appeal for a new trial in a criminal case under the revised Cr. Code sec. 1021 (former sec. 747) on the ground that the verdict is against the weight of evidence, should only be granted when the verdict is so clearly against the evidence as to amount to a denial of justice.
2. A new trial should not be granted merely because the jury has disregarded the uncorroborated testimony of the accused as to alleged facts which might relieve him from liability.

IBERVILLE, QUE., November 15, 1905.

LEMIEUX, J.:—The accused have, by motion, asked leave to apply to the Court of Appeal to obtain a new trial, on the ground that the verdict rendered in this cause is against the weight of evidence.

It is the rule, and to depart from it would be prejudicial to the administration of justice and calculated to destroy the efficacy and authority of the verdict of a jury, only to grant such leave when the verdict is so clearly against the weight of evidence as to constitute a denial of justice.

The Court cannot admit that the verdict is not based upon any evidence. On the contrary, the evidence of the writing, and of the publication of the article by Doré is decisive. It leaves, also, no doubt as to the libellous character of the article. Therefore, the libel has been proved against him, the verdict is valid, and we concur in it.

As to the accused Molleur, the evidence has not been contradicted that he was proprietor of the newspaper at the time

of the publication of the libellous article. Therefore he was criminally responsible. The evidence against him of this responsibility is complete. But he has attempted to escape this responsibility by proving that he was absent at the time the article was published. His evidence has not been corroborated. Moreover the jury had full power in view of the circumstances, the behaviour of the witness in the box, his manner of giving evidence and his great interest in the case, to accept his declaration or not. It was a simple question of fact upon which opinions might be divided, but it was a question of fact which the jury alone could decide, and it was competent for them to find that the character of the evidence in support of the accusation was superior to that made to sustain the defence.

The Court, under the circumstances, would not be justified in granting leave to the accused to apply to the Court of Appeal for a new trial, and their motion is rejected.

Leave refused.

P. A. Chassé, K.C., and *A. D. Girard*, for the prosecution.
F. J. Bisaillon, K.C., for defendant.

NOTE:—See the preceding case, *R.* v. *Molleur* (No. 1).

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE GRAHAM, E.J., AT CHAMBERS.

THE KING v. CLARK (No. 1).

Summary conviction—Fine—Imprisonment in default—When hard labour may be added—Cr. Code, 1892 sec. 872(c)—Revised Code sec. 739(2).

1. Sec. 739(2) of the Revised Cr. Code authorizes the imposition of hard labour upon an imprisonment in default of distress, only where imprisonment with hard labour in the first instance might have been imposed in addition to a fine with imprisonment in default of distress or payment.

ARGUED: October 30, 1906.
DECIDED: November 2, 1906.

Motion on notice to the prosecutor and convicting magistrate, on the return of an order in the nature of a writ of *habeas corpus* made by Russell, J., under chapter 181, Revised Statutes of Nova Scotia, 1900 ("Of Securing the Liberty of the Subject"), for the discharge of the defendant, John P. Clark, a prisoner in the common gaol at Amherst, where he was confined under a warrant of commitment, issued on a conviction made against him for unlawfully selling intoxicating liquor at the town of Springhill, Nova Scotia, between the 24th day of June, 1906, and the 24th day of September, 1906, contrary to the provisions of the second part of the Canada Temperance Act, for which he was adjudged to pay a penalty of $50 and costs, and, in default of payment, imprisonment with hard labour for three months.

The grounds on which the motion was made were that hard labour could not be added to a term of imprisonment awarded as a means of levying and collecting the pecuniary penalty, and that such penalty should have been levied by distress, before imprisonment was resorted to.

HALIFAX, N.S., October 30, 1906.

John J. Power, for the prisoner, referred to Acts (D.), 1904, ch. 41; Acts (D.), 1900, ch. 46, amending Code section 872; Code sections 93, 95, 96, 177, 208, 255, 512; *R.* v. *Horton*, 31 N.S.R. 217; 3 Can. Cr. Cas. 84; *R.* v. *Blank*, 38 N.S.R. 337; 10 Can. Cr. Cas. 358; *R.* v. *MacFarlane*, 24 N.S.R. 54; *R.* v. *Ferguson*, 26 N.S.R. 154.

J. L. Ralston, for the magistrate and prosecutor, referred to *Ex parte Casson*, 2 Can. Cr. Cas. 483; *R.* v. *MacDonald*, 26 N. S.R. 94.

HALIFAX, N.S., November 2, 1906.

GRAHAM, E.J.:—The defendant has applied for his discharge upon *habeas corpus* proceedings because the commitment under

the Canada Temperance Act provides for imprisonment with hard labour in default of payment of the penalty. He was detained under that commitment only, as appears by the return as amended.

The Canada Temperance Act, 1904, ch. 41, provides that a defendant on conviction "shall be liable to a penalty for the first offence of not less than fifty dollars or imprisonment not exceeding one month with or without hard labour."

It has been held that the imprisonment there mentioned is an alternative penalty of punishment, not an imprisonment in default of payment of the fine or of distress (see *R.* v. *Blank*, 10 Can. Cr. Cas. 358, 38 N.S.R. 337; *R.* v. *Horton*, 3 Can. Cr. Cas. 84, 31 N.S.R. 217). In case of imprisonment for such default, when can hard labour be imposed?

The amendment of 1900 (ch. 46) to the Code, sec. 872, provides that "whenever under such Act or law imprisonment with hard labour may be ordered or adjudged in the first instance *as part of the punishment* for the offence of the defendant, the imprisonment in default of distress or of payment may be with hard labour."

I think that this provision is applicable to statutes imposing both imprisonment with hard labour and a penalty with imprisonment in default of payment or distress (see Code secs. 208, 512, etc.). In such a case it would be anomalous for the person serving for the whole penalty to be imprisoned part of the time with hard labour and part without.

That view will give an office to the words *"as part of the punishment"* in the provision I have cited. And that is not the case of this statute of 1904, ch. 41.

The defendant must be discharged with the proviso that no action shall be brought in respect to his imprisonment.

Prisoner discharged.

[SUPREME COURT OF THE NORTH-WEST TERRITORIES.]

PROVINCE OF SASKATCHEWAN.

BEFORE SIFTON, C.J., AND WETMORE, SCOTT, NEWLANDS AND HARVEY, JJ.

THE KING v. SINCLAIR.

Conspiracy—Returning officer at provincial election—Defrauding candidate from being returned as member—Defrauding electors—Charge—Particulars—Revised Criminal Code secs. 444, 573, 859.

1. The offence of conspiracy to defraud under the Revised Code sec. 444 does not include a conspiracy to defeat a candidate's chances of election by the employment of unlawful devices.
2. A charge of conspiracy the particulars of which severally allege that the accused conspired to defraud a candidate at an election to the Saskatchewan Legislature, the electors of the division and the public, by illegally obtaining the return of the opposing candidate, does not disclose an offence under sec. 573 the Revised Criminal Code, for the acts alleged as the object of the conspiracy do not constitute an indictable offence either by statute or at common law.
3. Personation of a voter is not an offence at common law.
4. Particulars furnished under sec. 859 of the Revised Code (former sec. 616) have not the effect of amending or extending the scope of the original indictment or charge, and the inclusion of a separate and distinct offence as a particular under a charge of conspiracy will not authorize a conviction which would otherwise not be within the scope of the indictment.

DECIDED: October 19, 1906.

Case stated by Prendergast, J., under sec. 743 of the Criminal Code, 1892. The following was the case as stated:

The accused was tried before me, with a jury, at Prince Albert, on 6th June, 1906, on a charge purporting to be laid under section 394 of the Criminal Code of Canada.

The charge as amended reads as follows:

"For that he, the said James Sinclair, being the returning

officer at an election held on the 13th day of December, 1905, to elect a member to represent the electoral division of Prince Albert in the Legislative Assembly of the province of Saskatchewan, did on or about the 1st day of December, 1905, and on divers other days between the 1st day of November, 1905, and the 13th day of December, 1905, at or near the city of Prince Albert, in the province of Saskatchewan, and within the judicial district of Saskatchewan, unlawfully conspire with John F. Nelson, Charles J. Sutherland, Rory McLeod, and divers other persons, to defraud Samuel James Donaldson, a candidate at the said election, from being returned thereat as member of the said Legislative Assembly for the said electoral division.

"2. For that he, the said James Sinclair, returning officer, at the time and place aforesaid, did unlawfully conspire with John Nelson, Charles J. Sutherland, Rory McLeod, and divers other persons, to defraud the electors of the aforesaid electoral division of Prince Albert, by illegally obtaining the return of Peter D. Tyerman as a member for the said Legislative Assembly for the said electoral division.

"3. For that he, the said James Sinclair, being the returning officer aforesaid, did, at the times and places aforesaid, unlawfully conspire with the said John F. Nelson, Charles J. Sutherland, and Rory McLeod, and divers other persons unknown, by fraudulent means to defraud the public, by procuring, by the means aforesaid, Peter David Tyerman, a candidate at the said election, to be illegally returned thereat."

The particulars furnished with the charge were as follows:

"1. Conspiring to grant in the said electoral division of Prince Albert, subsequent to the issue by the said James Sinclair therein of the election proclamation, and prior to the nomination day at the said election, three additional polling divisions, namely, No. 24, Pine Point; No. 25, Sandy Lake, and No. 26, Bear Lake, without the authority thereto required.

"2. Conspiring to appoint deputy returning officers for the said three polling places and to deliver to them the poll books

and ballot boxes therefor, before nomination day at the said election, and before receiving any sufficient demand for the opening of the said three polling places.

"3. Conspiring to cause to be entered in the poll books for the said three polling divisions an erroneous place and date of administering the oath to the said deputy returning officers.

"4. Conspiring to represent that the oaths of office had been administered to the said deputy returning officers, without the same having been so administered.

"5. Conspiring to withhold notice of the granting of the said three polling divisions from the said Samuel James Donaldson, until it would be too late for him to be represented thereat.

"6. Conspiring to falsely represent that a number of votes were polled at the said three polling places, in favour of Peter David Tyerman, and to count them in favour of the said Peter David Tyerman.

"7. Conspiring to falsely fill in, in the poll books of the said three polling divisions, names of certain persons as having voted at the said three polling divisions without such persons having voted thereat.

"8. Conspiring to pretend to hold a poll at said three polling divisions without such polls being held.

"9. Conspiring to mark ballots as having been cast at the said three polling divisions without such ballots having been cast."

The jury found the prisoner guilty, and I suspended passing sentence pending the present reference to the Court in banc.

4. The question for the consideration of the Court is as follows:

Does the charge, read in the light of the particulars furnished therewith, constitute an indictable offence under section 394 of the Criminal Code of Canada, or under any other section of the said Code?

N. Mackenzie, for the defendant.

J. Muir, K.C., and *E. L. Elwood,* for the Crown.

REGINA, October 19, 1906.

WETMORE, J.:—A suggestion was made at the hearing of this case that the learned Judge should amend it by raising the question whether a common law offence had been set out in the charge. It seemed, however, that the counsel for the Crown at the trial distinctly asserted that he did not rely upon a common law offence, but placed his right to a conviction entirely under section 394 of the Code. Under such circumstances, the learned Judge refused to make the suggested amendment, and, in my opinion, was quite right in doing so, because no question with respect to a common law offence could have been submitted to the jury.

The first question to be decided is whether the charge with the particulars disclosed an offence under section 394 of the Code. I am of opinion that it does not. This section is found in Part XXVIII. of the Code, and that part, apart from some few sections which deal with marks on public stores and unlawful possession of such stores and receiving arms, clothing, etc., from soldiers or seamen, or the like, deals with matters of fraud. Section 394 is the only one that deals with conspiracy to defraud. The other sections that deal with fraud deal with fraud of a character which deprives a person of his property or right of property; something of a commercial or of a tangible character. No provision of a substantive character is made for punishment of a fraud such as is alleged to have been in the minds of the conspirators in this case. I cannot bring my mind to the conclusion that Parliament intended to make a conspiracy to defraud in the way suggested by the charge in this case, an offence, and make no provision for a substantive offence of that character.

I am of the opinion that the conspiracy to defraud contemplated by section 394 of the Criminal Code is not to defraud in the sense set out in the charge in this case, read with the light of the particulars set out in the stated case. The conspir-

acy contemplated by the section is not one to defraud a candidate of his hopes or expectations of being elected, or the electors or the public of their hopes or expectations of having a certain candidate elected. The conspiracy intended is one to deprive or defraud "the public or any person" of certain substantial rights such as its or his property or means or something of a like character. Mr. Crankshaw, in his work on the Criminal Code, 2nd ed., at p. 432, has set out a number of cases in which it has been held that the section applies, and these cases illustrate, I think, very fairly what I intend to convey.

The next question for consideration is whether the charges, in the light of the particulars, constitute an offence under section 527 of the Code. That section is as follows: "Every person is guilty of an indictable offence and liable to seven years' imprisonment who, in any case not hereinbefore provided for, conspires with any person to commit any indictable offence."

The matters with respect to which the accused is alleged to have conspired are: (1) to defraud Samuel James Donaldson, a candidate at the said election, from being returned thereat as member of the Legislative Assembly: (2) to defraud the electors of the electoral division by illegally obtaining the return of Peter D. Tyerman as a member of the said Assembly; and (3) to defraud the public by procuring the return of the said Peter D. Tyerman as such member.

The question arises, are these matters with respect to which the conspiracy was had indictable offences? If they are, it would seem to me that the charge would hold under the section of the Code in question; if they are not, it will not hold. It is very clear that these matters do not amount to a statutory offence. I cannot find any statute which creates such matters an indictable offence. Then, are these matters indictable offences at common law? I have looked into this question also, and I cannot find that they are.

In 2nd Russell on Crimes, 6th ed., p. 463, the following is laid down as a definition of cheats and frauds punishable at

common law, namely, "the fraudulent obtaining of the property of another by any deceitful and illegal pretence or token (short of felony) which affects or may affect the public."

In *Regina* v. *Bent*, I Den. C.C. 157, 161, the accused was charged in two counts with intending deceitfully and fraudulently to contravene the provisions of an Act of Parliament, and to prevent a fair election of councillors from taking place for a ward, and wrongfully and deceitfully wishing to make it appear that A. and B., who were then and there respectively candidates for the offices of councillors of and for the said ward, were duly elected councillors thereof at the election aforesaid for the said ward, falsely, fraudulently, deceitfully, and contrary to, and in fraud of the provisions of the statute aforesaid, in that behalf did personate one J. H., the name of J. H. being then on the burgess roll of the said ward, and the defendant then and there as in the name of the said J. H. did give his vote for the said A. B. This was simply a charge of personation. The question, therefore, arose, "did these counts contain the description of an offence at common law?" The Court held they did not. (See p. 162).

In *Regina* v. *Hogg*, 25 U.C.R. 66, also for personating a voter at a municipal election, *Regina* v. *Dent* was followed, and it was held not to be an indictable offence.

I can perceive no difference so far as the question involved is concerned between a municipal election and an election to the Legislative Assembly. Possibly the acts referred to in the particulars, namely, granting three additional polling divisions subsequent to the issue of the returning officer's proclamation and prior to nomination day, and withholding the notice of granting of the three polling divisions from the candidate Donaldson, may have been a contravention of the Territorial Elections Ordinance, and, if so, it would be punishable under section 128 of that Ordinance, but it would not be an indictable offence so as to bring it within the purview of section 527 of the Code.

Section 7 of the particulars is as follows: "Conspiring to

falsely fill in the poll books of the other three polling divisions the names of certain persons as having voted at the said three polling divisions without such persons having voted thereat."

It was alleged that this was an indictable offence under section 503 of the Code. That section is as follows: "Every one is guilty of an indictable offence and liable to seven years' imprisonment who wilfully—(*a*) destroys, injures, or obliterates, or causes to be destroyed, injured, or obliterated; or (*b*) makes or causes to be made any erasure, addition of names or interlineation of names in or upon any writ of election, or any return to a writ of election, or any indenture, poll-book, voters' list, certificate, affidavit, or report, or any document, ballot, or paper made, prepared, or drawn out according to any law in regard to Dominion, provincial, municipal, or civic elections."

It seems to me that the furnishing of this particular will not help the Crown, because the original charge is, as I have already stated, namely, conspiring to defraud Donaldson, the electoral division, and the public respectively; that is the gravamen of the charge, and that will not support a charge under section 505 for making or causing to be made an erasure, addition of names, or interlineation of names in or upon a poll book. I am of opinion that such particulars cannot be referred to for the purpose of bolstering up a charge under that section.

In order to make my meaning more clear, I had better refer to the contention of the learned counsel for the Crown. The particulars were furnished under paragraph 2 of sec. 616 of the Code, and section 617 provides as follows: "When any such particular as aforesaid is delivered, a copy shall be given without charge to the accused or his solicitor, and it shall be entered in the record, and the trial shall proceed in all respects as if the indictment had been amended in conformity with such particular."

It was urged that the particulars so furnished, by virtue of this provision, became part of the charge. I am not of that opinion. They became part of the record for the purpose of this

trial, that is, to limit the Crown in so far as the charge is concerned to the acts of conspiracy stated in such particulars. The charge itself was not amended; the trial only proceeded as if it had been amended.

Assuming paragraph 7 of the particulars to contain a charge under section 503 of the Code, and I am not clear that it does, I am satisfied that such particulars could not be lifted up and incorporated in the original claim so as to form a charge under section 305, which was not necessarily embraced by the original formal charge as laid. I would very much like to see, if it were done, how a warrant of commitment for enforcing any sentence of imprisonment under section 503 would be worded. I must confess that my ingenuity has not been able to conceive how a warrant for that purpose could be made out under such circumstances.

The question was raised whether the several counts of the charge are valid in form, in so far as the first two counts are concerned, because it is not alleged that the conspiracy was made by deceit, falsehood, or other fraudulent means; and as to the third count, because the subject matter of the conspiracy was not one in which the general public as such were concerned or with respect to which they could be defrauded. I do not feel called upon to express a decided opinion upon these questions. In *Regina* v. *Skelton*, 4 Can. Cr. Cas. 467, 2 N.W.T. Rep, part I., p. 210, a charge was laid under section 147 of the Code for making a false solemn declaration; the charge omitted to allege that the false declaration was made with intent to mislead; it was held that the omission of that allegation did not vitiate the charge. I think if that decision is binding upon this Court as at present constituted, we must hold that the charge in this case is good in so far as the question I am now discussing is concerned. I have always had doubts whether that case was correctly decided in the respect mentioned, and if I am not bound by that decision I think I would be inclined to hold the charges in this case bad in form. But I very much doubt whether it

is open to the Court to decide that question, because the trial Judge informed me that no question of that sort was raised at the trial, and certainly no such question was pressed before this Court at the first argument at Calgary. It was raised by the members of the Court after the argument there, and therefore the second argument was directed for the purpose of discussing such question. I therefore cannot conceive that it was the intention of the trial Judge to reserve any such question for the opinion of this Court.

It is true that the case as stated and the questions submitted are large enough to embrace the points in question, but this Court has repeatedly held that it has no authority, on the consideration of a stated case, to decide any question not submitted by the case, and, inasmuch as the learned Judge never intended to submit the question, I very much doubt whether we should decide the points raised as to the form or validity of the charge. It is not, however, necessary to express any decided opinion upon the subject, because I have come to the conclusion, for the reasons previously stated in this judgment, that the conviction should be quashed.

NEWLANDS, J.:—The question on which the opinion of this Court is asked is: Does the charge, read in the light of the particulars furnished therewith, constitute an indictable offence under section 394 of the Criminal Code, or under any other section of said Code?

Section 394, to which the charge expressly refers, is headed, "Conspiracy to defraud," and makes every one guilty who conspires with any other person "by deceit or falsehood or other fraudulent means." These latter words, "other fraudulent means," must be restricted in their meaning, by the particular words which precede them, to other fraudulent means in the nature of deceit and falsehood. That this interpretation is the correct one is, I think, also shewn by the last words of the section, "whether such deceit or falsehood or other fraudulent

means would or would not amount to a false pretence as hereinbefore defined."

This definition is given in section 358 of the Code as follows: "A false pretence is a representation, either by words or otherwise, of a matter of fact either present or past, which representation is known to the person making it to be false, and which is made with a fraudulent intent to induce the person to whom it is made to act upon such representation. Exaggerated commendation or depreciation of the quality of anything is not a false pretence, unless it is carried to such an extent as to amount to a fraudulent misrepresentation of fact."

The question then is: What class of offences does section 394 aim at? Its words are to prevent persons from conspiring "by deceit or falsehood or other fraudulent means to defraud the public or any person ascertained or unascertained, or to affect the public market price of stocks, shares, merchandise, or anything else publicly sold." These words, read in the light of the meaning of the word "defraud," as given in the new English dictionary, that it is to deprive a person by fraud of what is his by right either by fraudulently taking or dishonestly withholding it from him, and in the restricted meaning which must be given to "other fraudulent means," can, it seems to me, be interpreted in no other way than that they were intended to prevent persons from conspiring together by false and deceitful means to defraud the public or any person out of their money or property or to cause them to lose money by, in the same manner, affecting the price of anything sold.

Now, the charge in this case is not that the defendant defrauded any person or the public out of any money or property or caused any one to lose money, but that by unlawful means he prevented Samuel James Donaldson from being elected a member of the Legislative Assembly, which is an offence that, in my opinion, is not contained in this section of the Code.

The first two counts of the charge are also defective by not stating that he conspired "by deceit or falsehood or other fraud-

ulent means." They simply state that he conspired to defraud, the means by which the conspiracy was to be carried out not being stated, as required by the section. The meaning of "defraud" being restricted by section 394, it is therefore a necessary ingredient of the offence that it was done in the manner stated by the Code. I think these two counts cannot be aided by the particulars, as the charge itself should contain all the ingredients of the offence as contained in the section of the Code under which it is laid.

This last objection does not apply to the third count, which is bad only because the offence charged in it is not one of the offences contained in that section, and because the public have no rights in this matter out of which they can be defrauded.

If this charge is not an offence under section 394, is it an offence under any other section of the Code? Section 527 is the only other section under which, in my opinion, this charge could come. That section provides that every one is guilty of an indictable offence who, in any case not thereinbefore provided for, conspires with any person to commit an indictable offence.

Are therefore the unlawful acts which Sinclair conspired to do indictable offences? They were not offences known to the common law, but are made offences by the Elections Ordinance, and by section 128 of that Ordinance a penalty of $500 or one year's imprisonment, or both, are imposed upon a returning officer for committing at least some of the offences mentioned in the particulars. In *Couch* v. *Steel*, 3 E. & B. 402, at p. 410, Lord Campbell, C.J., says: "the penalty being annexed to the offence in the very clause of the Act creating it, no indictment or other proceeding could be taken against the person making default for the mere breach of the duty cast upon him by the Act. The duty being one of a public nature, the defaulter would be subject by the common law to an indictment for a breach of it, except for the particular mode of punishment by a penalty prescribed by the Act. As far as the public

wrong is concerned, there is no remedy but that prescribed by the Act of Parliament."

In *The Queen* v. *Robinson*, 2 Burr, 799, Lord Mansfield said: "The objection to this indictment is that the offence is not indictable because the Act of Parliament has pointed out a particular punishment and a specific mode of recovering the penalty which it inflicts. The rule is certain that when a statute creates a new offence by prohibiting and making unlawful anything which was lawful before, and appoints a specific remedy against such new offence (not antecedently unlawful) by a particular sanction and particular method of proceeding, that particular method of proceeding must be pursued and no other."

The offences set out in the particulars were not known to the common law before the passing of the Elections Ordinance, and they are punishable under section 128 of that Ordinance by fine or imprisonment, or both; and by sec. 133 these penalties may be recovered on summary conviction before two justices of the peace. Under the above mentioned rule, the particular method of proceeding pointed out by the Ordinance must be followed, and no other. They are not therefore indictable offences, and the accused could not therefore be prosecuted for conspiring to commit them under section 527 of the Code.

I can see no reason in this case why the accused was not prosecuted under the Elections Ordinance, because the offences he is alleged to have conspired to commit are certainly offences under that Ordinance; and the legislature in providing the penalties there prescribed evidently considered them sufficient for the offence. Even if he did not actually commit them, but only conspired to do so, it would be a breach of his oath that he would act faithfully in that capacity without partiality, favour, or affection; and, as that oath is a part of the Ordinance, he would, I think, be guilty of a contravention of its provisions by so conspiring and therefore punishable under section 128.

To prosecute a man for conspiring to commit an offence, when the charge should be for committing the actual offence itself, is strongly condemned by such eminent Judges as Lord Cranworth in *In re Rowlands*, 5 Cox C.C. 497; Lord Chief Justice Cockburn, in *Regina* v. *Boulton*, 12 Cox C. C. 87; and by Meredith, J.A., in *Rex* v. *Goodfellow*, 10 Can. Cr. Cas. 424, 11 O.L.R. 359, 365.

Cockburn, C.J., in *Regina* v. *Boulton*, said: "I am clearly of opinion that where the proof intended to be submitted to a jury is proof of the actual commission of the crime, it is not the proper course to charge the parties with conspiring to commit it; for that course operates, it is manifest, unfairly and unjustly against the parties accused; the prosecutors are thus enabled to combine in one indictment a variety of offences, which, if treated individually as they ought to be, would exclude the possibility of giving evidence against one defendant to the prejudice of others, and deprive defendants of the advantage of calling their co-defendants as witnesses. I do not say this merely on my own authority; I have the authority of the late Lord Cranworth—one of the ablest of our Judges—for the view I have expressed. In a case before him, in which the parties had been indicted, not for the offence they had committed, but for conspiracy to commit it, that eminent Judge said that such a course was no doubt legal, but that it would have been more satisfactory if they had been indicted for that which they had done, and not for conspiring to do it."

For the above reasons I think that the question asked by the learned trial Judge should be answered in the negative.

SIFTON, C.J.:—I concur in the judgment of Mr. Justice Newlands.

SCOTT, J.:—I concur with Mr. Justice Wetmore.

HARVEY, J.:—I concur with Mr. Justice Wetmore.

Conviction quashed.

[COURT OF APPEAL FOR ONTARIO.]

BEFORE MOSS, C.J.O., AND OSLER, GARROW, MACLAREN AND MEREDITH JJ. A.

THE KING v. SAUNDERS. (No 1)

Common betting-house—Offence of keeping—Horse racing—Race meeting of an incorporated association—Exemption as to betting, inapplicable to offence of keeping a betting house—Bookmaker's booth a "place"—Cr. Code (1892), *secs.* 197, 198, 204—*Revised Code* (1906), *secs.* 227, 228, 235.

1. A moveable betting booth used by a bookmaker at a race track for the purpose of public betting is a "place" within section 227 of the revised keeping a common betting house.

Criminal Code 1906, and the bookmaker using it is properly convicted of

2. The exception, contained in sec. 235 of the Criminal Code 1906 relating to betting and pool-selling, whereby bets made on the race course of an incorporated association during a race meeting are exempt from its provisions, does not extend to the offence under Code sec. 227 of keeping a common betting house.

ARGUED: October 5. 1906.

DECIDED: November 3, 1906.

CASE stated by the police magistrate for the city of Toronto.

The following statement of the facts is taken from the judgment of Moss, C.J.O.:—

The defendants were brought before George Taylor Denison, police magistrate for the city of Toronto, upon an information charging them with keeping a disorderly house, to wit, a common betting house. They elected to be tried summarily, and pleaded not guilty. Evidence was adduced, and they were found guilty and fined.

It appeared that during the month of May, 1906, the Ontario Jockey Club, an incorporated association, held their annual spring race meeting at their racecourse and grounds known as "The

Woodbine." On part of the grounds is situated a stand with lawn in front known as the members' stand and lawn. On another part of the grounds to the east of the members' stand and lawn, is erected a stand known as the public stand with a lawn in front forming a large space which is separated by a fence from the members' lawn. East of and adjoining the public stand is a building or structure of wood wholly walled in on the north side, partly walled in on the east and west sides, but open on the south and covered with a projecting shingled roof. Under the roof of this building are a number of what the witnesses called betting boxes or booths. They are not stationary, but stand on castors, by means of which they can be moved from any part of the building to another. In rainy weather they are left under the roof. In fine weather they may be and usually some of them are moved out on the lawn in front of the building. These are rented by book-makers, the rent payable for each one during the race meeting in question being $100 a day. During a portion of the time while the race meeting in question was in actual progress, that is to say, between the 19th and 28th days of May, 1906, the defendants were in possession of one of the booths, and were engaged in making bets with other persons who were attending the races. They exhibited on a board the names of the horses named to start in a race, and made bets with persons desirous of backing any of them for first or second place. The backer paid his stake to one of the defendants, and received a ticket shewing the terms of the bet. If he won, he was paid by one of the defendants on presentation of the ticket. In this way the defendants made bets with large numbers of the public during each of the above specified days of the meeting.

Upon the trial the defendants' counsel objected that the defendants could not be convicted under sec. 198 of the Criminal Code, because a booth such as was used was not a house, office, room, or other place, within the meaning of sec. 197 of the Code, and further because the offence, if any, was against the provisions of sec. 204 of the Code, and the defendants were entitled to the benefit of the saving clause or proviso contained in sub-sec. (2) of that section.

At the defendants' request the police magistrate stated a case for the opinion of this Court. The facts as found by him on the evidence, which is made part of the case, are set forth as follows:—

1. That the Ontario Jockey Club is a duly incorporated race association.

2. That the common betting house herein referred to was opened, kept, and used by the defendants during the actual progress of a race meeting.

3. That the defendants kept a betting booth placed in that part of the grounds of the Ontario Jockey Club specially set apart for betting purposes.

4. That such betting booth was opened, kept, and used by the defendants for the purpose of betting with persons resorting thereto.

5. That all the defendants were engaged in conducting the business of the said betting booth, which was leased by the defendant Saunders and under his immediate superintendence.

6. That a very large number of bets were made by the defendants against certain horses winning the different races, with persons resorting to said booth.

7. That in the enclosure specially set apart by the Ontario Jockey Club for betting purposes as aforesaid there are 36 betting booths, including the one above mentioned, known as two dollar books, which were leased to persons called book-makers for the purpose of betting as aforesaid.

8. That the defendants conducted and managed a betting booth as aforesaid during the whole of the race meeting, and the defendant Saunders paid therefor and for the betting privilege the sum of $100 for each day.

9. That the betting booths in question are of the following dimensions, six feet two inches in length, five feet two inches in width, and four feet seven and one-half inches high, and are equipped for the purpose of carrying on betting therein, and are supplied with castors so that in fine weather they may be moved from under the covered part of the betting section of the grounds to a distance of a few feet from the roof.

10. The defendants' position was changed daily from booth to booth, there being a daily drawing for position among the book-makers, but during each day these defendants occupied the same booth, where they made bets with persons resorting thereto.

The questions submitted are:—

(*a*) Am I right in holding that a betting booth as aforesaid falls within the terms of sec. 197 of the Criminal Code as a house, office, or other place?

(*b*) Am I right in holding that the provisions of sub-sec. (2) of sec. 204 of the Criminal Code do not apply to the offence of which the defendants are found guilty?

TORONTO, October 5, 1906.

J. M. Godfrey, for the defendants. The conviction must be under sec. 204, and the exception in sub-sec. (2) must apply. I shall be met with the decision in *Rex* v. *Hanrahan* (1902), 5 Can. Cr. Cas. 430 3 O.L.R. 659, but that is distinguishable, because the betting there was not upon the races actually in progress. The betting booth described in the evidence is not a house, office, room, or other place, that is, other place of the like kind, for the *ejusdem generis* rule must be applied. The booth is movable, and has no roof or windows—it is just a desk enclosed. Section 197 refers to a permanent structure. The booth is an apparatus for recording bets: sub-sec. (*b*) of sec. 204. The book-makers do no more than if they stood in the open. Suppose a book-maker sat in a bath-chair, or in a drag, or upon a camp stool, would he be doing business in a house, room, office, or other place? To establish an offence something in the nature of a nuisance must be shewn. Nobody who resorts to the booth to bet with the book-makers enters it; how can it be a disorderly house? See sec. 199 as to lookers-on. No bet is completed inside the booth. At best Saunders is the only defendant liable. I refer to *Stratford Turf Association* v. *Fitch* (1897), 28 O.R. 579; *Powell* v. *Kempton Park Racecours Co.*, [1897] 2 Q.B. 242, [1899] A.C. 143;

Rex v. *Hendrie* (1905), 10 Can. Cr. Cas. 298, 11 O.L.R. 202; *The Queen* v. *Stannard* (1863) 33 L.J.M.C. 61.

J. R. Cartwright, K.C., for the Crown, relied on *Rex* v. *Hanrahan*, 5 Can. Cr. Cas. 430, 3 O.L.R. 659; *Rex* v. *Hendrie*, 10 Can. Cr. Cas. 298, 11 O.L.R. 202; *Powell* v. *Kempton Park Racecourse Co.*, 19 Cox C.C. 265, [1897] 2 Q.B. 242, [1899] A.C. 143; *The Queen* v. *Humphrey*, [1898] 1 Q.B. 875; *Brown* v. *Patch*, [1899] 1 Q.B. 892, 19 Cox C.C. 330; *Rex* v. *Deaville*, [1903] 1 K.B. 468.

Godfrey, in reply.

TORONTO, November 3, 1906.

MOSS, C.J.O. (after setting out the facts as above):—There is thus once more raised the question so much debated in *Rex* v. *Hanrahan*, 5 Can. Cr. Cas. 430, 3 O.L.R. 659, and *Rex* v. *Hendrie*, 10 Can. Cr. Cas. 298, 11 O.L.R. 202, as to the extent and meaning of secs. 197, 198, and 204, of the Criminal Code, and the relation of the latter to the two former.

It will, however, be more convenient to deal *seriatim* with the questions as submitted. In view of the findings and evidence, the first question presents no serious difficulty.

Much light is afforded by the cases decided in England under the Imperial Act 16 & 17 Vict. ch. 119, as well as by our own decisions.

Whether the booth in question here was a house, office, or other place, within the meaning of sec. 197, is largely, if not entirely, a question of fact. The point to be determined is, whether the nature of the structure, its position on the race grounds, the manner of its occupation by the defendants, and the uses to which it was being put, justify the conclusion that it was a house, office, or other place, opened, kept, or used for any of the purposes specified in the section.

The English cases develop two lines of decision depending upon the facts in each case. They turn chiefly on the point whether there was or was not such a fixity or localization, by the persons charged, of structure or ground as to constitute a "place" within the 16 & 17 Vict. ch. 119.

The Courts have declined to define a place in general terms—but they recognize the principle that a "place" must be in some sense fixed and ascertained, and the inquiry is whether the facts of the particular case shew that the person charged was making such use of a house, office, room, or other place, in which he was operating, as to bring him within the Act.

In *Shaw* v. *Morley* (1868), L.R. 3 Ex. 137, the facts were not unlike those of the present case. There was a temporary wooden structure erected on a strip of ground bounded by a railing which surrounded an enclosure forming part of the Doncaster racecourse, and partitioned into plots, on each of which was a wooden structure containing two desks. It was held that the structure, though open to the air, was an "office" and a "place" within the meaning of the statute. Kelly, C.B., said (p. 140): "It is no matter whether there is a roof or none, or whether the structure is movable or fastened to the earth; it is clearly an office within the meaning of the Act." Martin, B., said (p. 140): "I am of the same opinion. The structure described was both an office and a place. What it most resembles is those movable offices on wheels in which merchants conduct their business of lading and unlading ships in the docks of Liverpool, and I have no doubt that such a structure would be an office or a place within the Act. But this was more, it was a fixed place." And Pigott, B., added (p. 140): "The circumstance that this office is only a temporary structure of wood is of no importance."

In *Bows* v. *Fenwick* (1874), L.R. 9 C.P. 339, where the appellant Bows stood on a stool under a large umbrella, the umbrella being fixed in the ground, and not being used for protection against rain, but being kept up all day whether it was wet or fine, it was held that the appellant was using a "place" within the Act. Emphasis was laid on the fixed and ascertained nature of the spot as denoted by the presence of the umbrella, on which was the appellant's name, and under which he stood on a stool and called and offered to make bets and did make bets with persons who resorted there. Coleridge, C.J., said (p. 344): "The only question raised before us was, whether or not they (i.e., the stool and umbrella) did constitute an office, room, or other place. Now, the thing described

clearly was not a house or a room. Was it an office or other place? Possibly it might be said to be in some sense an office, but I am of opinion that at all events it was a 'place.' It was an ascertained spot where the appellant for the time at least carried on the business of betting with all persons who might resort thither for that purpose." Brett, J., said (p. 346): "I agree that it is necessary that it should be a 'fixed place,' whether on a racecourse or elsewhere . . . Now, was this a fixed place? It was a place selected and fixed upon by the appellant for persons who desired to deal with him to resort to." And Denman, J., was of the same opinion.

In *Liddell* v. *Lofthouse*, [1896] 1 Q.B. 295, it was held that a little bay on the back of a hoarding on a quay bounded by the stays supporting the hoarding was a "place" within the meaning of the Act.

Brown v. *Patch*, [1899] 1 Q.B. 892, 19 Cox C.C. 330, was decided in the light of the well-known and much debated case of *Powell* v. *Kempton Park Racecourse Co.*, [1897] 2 Q.B. 242, and [1899] A.C. 143. Patch, a professional betting man, went with his clerk into enclosed grounds, where horse and other races were being held, and erected a structure of bamboo cane about 5 feet high with a board on the top, on which was printed his name. Beside this structure he placed a wooden box, and from time to time he stood on the box and shouted the odds on different horses, and invited all persons to bet with him, and persons did there bet with him. It was held that there was a sufficient localization of the business of betting at this structure to constitute it a "place" within the statute.

In *Powell* v. *Kempton Park Racecourse Co.* (*supra*) the whole subject was exhaustively discussed in the Court of Appeal and in the House of Lords. It was held, though not without strong dissent by Rigby, L.J., in the Court of Appeal, and Lords Hobhouse and Davey in the House of Lords, that the facts agreed on and stated in that case did not constitute an offence under the 16 & 17 Vict. ch. 119. But, as pointed out by Darling, J., in *Brown* v. *Patch* (*supra*), while all the previous decisions were reviewed and some were overruled, some emerged as good law, and among them *Shaw*

v. *Morley*, *Bows* v. *Fenwick*, and *Liddell* v. *Lofthouse* (*supra*). And it was not denied that one important test was fixity or localization.

In *Brown* v. *Patch* (*supra*) Darling, J., after quoting from the judgments of some of the law Lords, said (p. 897): "One of the noble Lords, therefore, says that there must be a definite localization of the business of betting, and the Lord Chancellor says that, in order to satisfy the statute, there must be a place which is sufficiently definite in which a betting establishment might be conducted." Channell, J., said (p. 899): "The important question is not so much, what is a place? but what is the character of the user of it? and although the words used are 'house, office, room, or other place,' and it is clear that, according to the ordinary rule, 'place' must be something *ejusdem generis* with 'house, office, room,' yet the analogy is with respect to the way in which the place is used rather than with respect to the way in which it is constructed. I think those propositions are clearly brought out in the judgments delivered in the House of Lords . . ." And dealing with the facts of the case before him he said (p. 900): "In the present case I think the facts are sufficient to bring it within the statute, and that the inference ought to be drawn that what the respondent did was not merely indicating that he was a man prepared to bet with anybody who would bet with him, but it was indicating that he was using that place as a place where he could be found and was carrying on his business. He was localizing his business there, with the object of attracting people there, and to prevent him from having to look for them all over the grounds."

Are the facts of the present case sufficient to justify an inference similar to that drawn in *Brown* v. *Patch*? The defendants were in charge of a definite localized place and occupying and using the structure for the purpose of carrying on the business of betting with all persons who might resort thereto for the purpose of betting with them. It was so situated and marked out that any one wishing to bet could readily find the defendants there. The booth, though open to the air, had some of the characteristics of a room and many of those of an office. It was enclosed by walls of a considerable height, and it contained the usual fittings or accessories

of an office, such as desks, tables, and chairs. Business was transacted there in connection with bets made and the money received and paid in respect of such bets. It was as much an "office" and "place" as the structure described in *Shaw* v. *Morley* (*supra*). The police magistrate was, therefore, right in holding that the betting booth so used by the defendants fell within the terms of sec. 197 of the Code. If it was not an "office," it was certainly a "place," but it was probably both.

The first question should, therefore, be answered in the affirmative.

The answer to the second question depends, as already stated, upon a consideration of the relation (if any) of sec. 204 to secs. 197 and 198.

Reading the former, it is not easy to see what it has in common with the other two, except in respect of the general ground that each is directed to the suppression of methods adopted for enabling persons to indulge in the practice of betting. Each seeks to prevent or end means adopted for giving persons who are minded to bet an easy opportunity of doing so. But they do not deal with the same cases or class of cases. Without going the length of saying that proof of the commission of some of the acts proscribed by sec. 204 would not be any evidence to support a charge of keeping a common betting house under secs. 197 and 198, it may safely be said that it is not easy to conceive a case in which a person charged under sec. 204 could be convicted on proof merely of the facts necessary to support a charge under secs. 197 and 198.

In the present case there is nothing in the findings of the stated case or the evidence to bring the defendants within the scope of sec. 204. The most plausible argument urged in favour of the view that this was a case falling within sec. 204 was that the defendants were keeping, exhibiting, or employing a device or apparatus for the purpose of recording bets or wagers. But it seems plain that the device or apparatus referred to in sec. 204 (*b*) is something entirely different from a betting booth to which the public resort for the purpose of betting with a person who appears to be the owner, occupier, keeper, or manager thereof, or the ordinary equip-

ment of such a booth. The distinction between two Acts of somewhat similar import is shewn in *People* v. *Weithoff* (1892), 93 Mich. 631. In *State* v. *Shaw* (1888), 39 Minn. 153, where the indictment charged the defendants with gambling with gambling devices devised to be used in gambling, the Court at p. 156 used language that seems applicable to the defendants' argument in this case: "A horse race is not a gambling device, nor are descriptive lists of such races, or statements or announcements of the particulars thereof, from which those desiring to bet on the races may more conveniently obtain information in respect to the same. The betting is on the races exclusively, and the result is in no way determined by the use of the instrumentalities in question, and no additional element of chance is introduced thereby."

The provisions of sec. 204, except the words "or made on the racecourse of an incorporated association during the actual progress of a race meeting" at the end of sub-sec. (2), were first enacted by Parliament in 1877 by the 40 Vict. ch. 31. In 1892, when the Criminal Code was first enacted, the latter words were added to sub-sec. (2). At the same time secs. 197 and 198 were for the first time introduced into our law, being taken from the Imperial Act 16 & 17 Vict. ch. 119. There was then no more doubt than there is to-day that these provisions prohibited the keeping of a common betting house on a racecourse, even though the betting carried on was during the actual progress of the races. If it was the intention of Parliament to sanction the existence of betting houses on racecourses at such times and under such circumstances, one would have expected that when it enacted these sections it would have introduced into them a clause similar in import to the words added to sec. 204. Instead of so doing, it expressly confined the operation of these words to the provisions of the latter section. In face of the clear language of sub-sec. 2 of that section, it does not seem possible to extend the saving clause to any other sections, or to say that it renders their provisions inapplicable to every form of betting carried on upon a racecourse during the actual progress of a race meeting. And in *Regina* v. *Giles* (1895), 26 O.R. 586, a Divisional Court, the then ultimate court of appeal in criminal

cases, seems to have been of the opinion that secs. 197 and 198 and sec. 204 (1) did not relate to the same matters: see *per* Boyd, C., at p. 592, and Meredith, J., at p. 594.

For the above reasons the answer to the second question should be in the affirmative. Indeed it might have sufficed to have referred to the reasons given in *Rex* v. *Hanrahan* (*supra*). But the earnestness with which it was argued that this case was not governed by the decision in that case may afford some reason for again traversing the same ground.

The questions should be answered in the affirmative and the conviction affirmed.

OSLER, J.A.:—I do not propose to go through the various Acts, Imperial or Colonial, which have been passed for the purpose of penalizing persons concerned in keeping, managing, using, or conducting the business of a common betting house, or in which a common betting house is defined. What we have to construe are the provisions of our Criminal Code, secs. 197 and 198. This we have to some extent done in the recent case of *Rex* v. *Hanrahan*, 5 Can. Cr. Cas. 430, 3 O.L.R. 659. We there held that sub-sec. (2) of sec. 204 could not be read into, and did not qualify, sec. 197. Whether that decision be sound or not in this respect, I am not now called upon to consider. I do not regret to be obliged to hold that it binds us in the present case, and that it can only be reviewed by the Supreme Court, or its effect annulled by legislation.

I am also prepared to hold that the structure described in the evidence and in the stated case is an "office" or "place," within the meaning of sec. 197, and, as such, a common betting house within that section. If the section is not qualified by sec. 204, sub-sec. (2), the case seems not distinguishable from *Shaw* v. *Morley*, L.R. 3 Ex. 137, where the words of the Act were "house, office, room, or other place," and where just such a structure as the stated case describes, whether movable or not, in which betting was carried on with the owner or occupier, was held to be an office or place within the Act, the keeping of which was held to be prohibited and illegal. To use the language employed in another

case, it is sufficient to bring it within the Act if it be a place where, according to the ordinary usages, a man would be found ready to bet with persons resorting thereto. Nothing which was said in the celebrated case of *Powell* v. *Kempton Park Racecourse Co.*, [1899] A.C. 143, is in conflict with the above decision.

I am of opinion, therefore, that the decision of the learned police magistrate was right, and would affirm the conviction.

MACLAREN, J.A., concurred.

GARROW, J.A. (dissenting):—Under the head "nuisances," sec. 196 of the Criminal Code defines a common gaming house, sec. 197 defines a common betting house, and sec. 198 declares every one guilty of an indictable offence who keeps "any disorderly house, that is to say, any common bawdy house, common gaming house or common betting house, as hereinbefore defined."

The definition of a common betting house is a "house, office, room or other place opened, kept or used for the purpose of betting between persons resorting thereto and (*i.*) the owner, occupier, or keeper thereof; (*ii.*) any person using the same; (*iii.*) any person procured or employed by, or acting for or on behalf of any such person; (*iv.*) any person having the care or management, or in any manner conducting the business thereof; or (*b.*) opened, kept or used for the purpose of any money or valuable thing being received by or on behalf of any such person as aforesaid, as or for the consideration, (*i.*) for any assurance or undertaking, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race or other race, fight, game or sport: or (*ii.*) for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency.

And but for a later section in the Code, to be presently referred to, there would not be much difficulty in arriving at the conclusion that the booths in question would, upon the authorities, fall within the prohibition contained in these sections.

The law under a statute similar in terms as to what will con-

stitute a "place" was very fully considered in the House of Lords in the well-known case of *Powell* v. *Kempton Park Racecourse Co.*, [1899] A.C. 143, in which many of the decided cases were passed in review. In that case it was held that the "place," which was an enclosure adjoining a racecourse, to which the public as well as the book-makers were admitted upon paying an entrance fee, but in which the book-makers had no definite assigned place or spot on which to carry on their business, was not a "place" within the meaning of the statute. But a careful perusal of the reasoning by which that result was arrived at seems to me to indicate that had the book-makers been localized in booths as in the present case the result would have been different. And, as it was, there was a very formidable dis ent both in the House of Lords and in the Court of Appeal.

But in England they have apparently no equivalent to the subsequent section in the Code to which I before referred. And it is, in my opinion, by reason of this section that the real difficulty in the present case arises. That section is 204, which provides that every one is guilty of an indictable offence, and liable to one year's imprisonment, *and to a fine not exceeding* $1,000, who (*a.*) uses or knowingly allows any part of any premises under his control to be used for the purpose of recording or registering any bet or wager, or selling any pool; or (*b.*) keeps, exhibits, or employs, or knowingly allows to be kept, exhibited or employed, in any part of any premises under his control, any device or apparatus for the purpose of recording any bet or wager or selling any pool; or (*c.*) becomes the custodian or depositary of any money, property or valuable thing staked, wagered or pledged; or (*d.*) records or registers any bet or wager, or sells any pool upon the result (*i.*) of any political or municipal election; (*ii.*) *of any race*; (*iii.*) of any contest or trial of skill or endurance of man or beast. But sub-sec. (2) declares that "the provisions of this section shall not extend to any person by reason of his becoming the custodian or depositary of any money, property or valuable thing staked, to be paid to the winner of any lawful race, sport, game, or exercise, or to the owner of any horse engaged in any lawful race, *or to bets between*

individuals or made on the racecourse of an incorporated association during the actual progress of a race meeting."

In *Rex* v. *Hanrahan*, 5 Can. Cr. Cas. 430, 3 O.L.R. 659, this Court held that it is an offence under secs. 197, 198, to keep a common betting house on the racecourse of an incorporated association during the actual progress of a race meeting, and that the exception contained in sub-sec. 2 of sec. 204 did not, under the circumstances, apply. But it was proved in that case that the house in question was used not merely for the purpose of making bets upon the races held upon that course, but for the purposes of betting upon other races. And the latter circumstance, in my opinion, quite distinguishes that case from this. Armour, C.J., whose terse judgment, in my opinion, expresses all that was intended to be there decided, also delivered the judgment of a Divisional Court in *Stratford Turf Association* v. *Fitch*, 28 O.R. 579, in which it was held that an agreement for the sale of the betting and gaming privileges at a race meeting upon the course of an incorporated association was not illegal. In the course of his judgment the learned Chief Justice says: "No evidence was adduced to shew that illegal betting or gaming was in the contemplation of the parties to this agreement at the time it was made, nor would the betting or gaming to be carried on under the agreement be necessarily illegal under sec. 204 of the Criminal Code; for the provisions of that section are not to extend to bets 'made on the racecourse of an incorporated association during the actual progress of a race meeting;' . . . The betting and gaming contemplated by the agreement was betting and gaming to be made on the racecourse of which the plaintiffs were the lessees, during the actual progress of a race meeting. . . . The object of the Legislature apparently was to reserve the racecourses of incorporated associations as places where betting might be made during the actual progress of a race meeting, without the bettors being subject to the penalties of that section."

I am and I have always been of the same opinion. Rightly or wrongly the Legislature has seen fit to make a very definite exception in the case of betting upon the racecourse of an incorporated association during the actual progress of a race meeting,

and the full benefit of this exception can, in my opinion, be claimed by any one charged with an offence under secs. 197, 198, if the evidence discloses that what was actually done falls within the exception contained in sub-sec. (2) of sec. 204. The whole statute must be read together, and effect given to every part of it which bears upon the subject matter in question. And in that view it seems to me impossible to hold that it is or can be an offence under secs. 197, 198, to do that which is clearly permitted to be done under sub-sec. (2) of sec. 204, namely, to carry on the business of betting on the racecourse of an incorporated association during the actual progress of a race meeting.

It would indeed be a curious result to hold, as was held by the Divisional Court in the judgment from which I have quoted, that the contract there in question was not illegal, and yet that the purchaser of the betting privileges who by the judgment was ordered to pay the purchase money, could not carry on the business which he had purchased by reason of secs. 197, 198.

This Court recently again considered these sections in *Rex* v. *Hendrie*, 10 Can. Cr. Cas. 298, 11 O.L.R. 202, in which the president of the Ontario Jockey Club was charged under secs. 197, 198, with keeping a common betting house because he was a party to the lease of the betting privileges upon the same track as that now in question to one Haskell, who sublet to others, and these others apparently used the premises in a manner similar to that found by the case to have been done by these defendants. The defendant was acquitted, as I then understood, and still understand, upon the facts. I concurred in the result, as I had previously concurred in the judgment in *Rex* v. *Hanrahan*. But, with deference, I did not concur, or at least intend to concur, in any interpretation of the statute except that applicable to the facts which were before us in those cases. In the *Hanrahan* case I thought they were sufficient to uphold the conviction; in the *Hendrie* case I thought they were insufficient; and I have not changed my opinion as to either case.

The proper construction, in a word, is, in my opinion, to hold that secs. 197, 198, have no application to the case of betting carried on upon the racecourse of an incorporated association during

the actual progress of a race meeting, whether or not such betting takes place within or without doors, or in any particular "house, office, room, or other place," so long as it is within the boundaries of the racecourse, and so long also as the betting is confined to the races then in progress upon that racecourse.

In this way, and in my opinion in this way only, can full effect be given to the whole of the sections of the Code in question, namely, 197, 198, and 204.

If it is desired to put a stop to betting such as that disclosed in the case before us, it is an easy matter for the Legislature to say so. I for one would not be sorry. But, as the matter stands, the legislative movement is rather the other way, for the exception to which I have referred is not in force, as I have said, in England at all, and was only introduced into our statute law in the year 1892.

For these reasons, I am of the opinion that the conviction should be quashed.

MEREDITH, J.A. (dissenting) :—The defendant has been convicted of the crime of keeping a disorderly house; that which he did was to ply his business of a "book-maker" on a racecourse of an incorporated association, at a small movable stand or stall supplied for the purpose by the association during the actual progress of a race meeting under a license from the association, for which he paid each day a large sum of money.

Upon this simple statement of the main facts, the obvious gap between that which was done and the crime of which the accused has been convicted, would, to the ordinary layman, appear too great to be leaped by any means; but other provisions of the Code, and the decisions of cases in England under a similar enactment, have gone at least a long way towards bridging it.

The character of the offence, of which the accused has been convicted, is indicated, in more than one way, in that part of the Criminal Code in which it is made a crime—Part XIV., under the title Nuisances, sec. 191 of which defines a common nuisance, sec. 195 a common bawdy house, sec. 197 a common gaming house, and sec. 197 a common bett ng house, whilst sec. 198 provides that

"Every one is guilty of an indictable offence and liable to one year's imprisonment who keeps any disorderly house, that is to say, any common bawdy house, common gaming house, or common betting house, as hereinbefore defined;" and that "Any one who appears, acts or behaves as master or mistress . . . of any disorderly house shall be deemed to be the keeper thereof . . ." So that the crime of which the accused has been convicted is put in the same category with, and made punishable in precisely the same manner as, keeping a common bawdy house, which is a very disreputable and grave offence in the eyes of every one.

These cases are numerous, and almost as conflicting as numerous, so that it is not surprising that some of the Judges felt that it was best to get "back to the land," as it were, and deal with the Act itself, rather than with refinement to which the cases had brought it. And so dealing with it, I would certainly have fallen into that which I must now think the error of considering it plain, that that which the Imperial Act made a crime was the opening, keeping, or using something of the character of that which in these days is known as a "bucket shop," a place kept and resorted to for the sole purpose of gambling; a modern means of gambling which might well be considered a menace to morals, an inducement to, and ready means of acquiring and indulging in, a bad and somewhat dangerous habit; and something very different from a place where actual dealing in stocks, or other commodities, is carried on, or where the betting, which is naturally incident to an actual horse race to those present at it many of whom may have a real interest in the horse or otherwise in the particular race, may be indulged in; something, not a mere desire to gamble, in which any sort of a horse race, or any sort of stocks or other commodities, and no matter where they may be, are really but the instruments used instead of dice, cards, or other antiquated means of indulging in the passion, the use of which would, in these circumstances, be illegal. But the cases have gone beyond that, so that if this case had to be considered under the Imperial enactment and the cases in England, it might be very difficult to say that the gap is not bridged, or tha the conviction is wrong. That the effect of some of these cases can hardly

be satisfactory, to layman or lawyer, cannot be doubted; to hold that one is guilty of a crime if he ply his business under an umbrella, and not guilty of any offence, but carrying it on quite lawfully, if he fold the umbrella and ply it under the greater canopy of the sky, can hardly be a satisfactory result to any one. It is unquestioned, and unquestionable, that the business of a book-maker is not unlawful, either under the Imperial enactment or that in question; and that it may be carried on upon the racecourse in question, or any other, without any infraction of the law. It is a mere matter of discarding the stands or stalls, or using them for the purpose of recording the bets only, and proceeding in a peripatetic manner, discarding house, office, room, or other fixed place—a manner less orderly, and much less well conducted, than that which has prevailed.

But, assuming that, under the Imperial enactment, and in England, the defendant would be adjudged guilty, the case is by no means concluded. We are not to blindly follow any decision, without regard to differences in the enactments, or different conditions that may obtain in the different countries. This is not a great horse-racing country; incorporated racing associations are comparatively very few; and many of the "evils," as well as of the benefits, of horse racing, so common there, are little, if at all, known here. The evils really aimed at there might be very different from those actually aimed at here; and that, as it seems to me, is made very plain by some of the provisions of the Criminal Code not at all to be found in the Imperial enactment; differences not wholly insignificant.

In order to find the meaning of Parliament, the whole of the legislation upon the subject must be read. The conviction is under sec. 198, but without the light thrown upon it by secs. 195, 196, and 197, great difficulty would surround it. So too sec. 204 throws some light upon it, though not in the direct way in which the other three sections do; but quite enough to make plain to me the very matter now in controversy.

That section makes it a crime in any one, among other things, to use any part of any premises under his control, or knowingly

allow them to be used, for the purpose of recording any bet; or to record any bet on the result of any race; but, among other exceptions, it expressly excepts bets made on a racecourse of an incorporated association during the actual progress of a race meeting; so that in the same Act, in dealing with the same subject, in closely connected sections, Parliament has made it quite clear that it was quite lawful for the defendant to have used the place in question for the purpose of recording, and to have there recorded, bets on any race made on that racecourse during the meeting, and quite lawful for the association to permit him to do so, and to charge him for the privilege as they did. Are we then to attribute to Parliament the absurdity of enacting, in one line, that bets might be recorded, but, in another, that they should not be made; of doing that which no man in his sober senses would do? I decline to do so; and am firmly of opinion that many of the inconsistencies, which appear to render an enactment defective, exist rather in defective range of vision than in errors of Parliament.

If we give to secs. 198 and 197 the meaning which in this country, even if they stood alone, they ought, in my opinion, to convey, there is no sort of conflict between these sections and sec. 204, nor any sort of inconsistency, or room for suspicion of want of care, in the passing of the enactment. Not intending that sec. 198 should apply to the usual betting upon a racecourse, where neither house, office, room, or like place is necessary, and saying nothing in that section which necessarily includes such betting, any such exception to it would have been out of place, conferring by implication a meaning to it not intended; but when dealing with sec. 204, its general words covering all cases, not merely a house, room, office, or place of a like nature, but any part of any premises, and any bet on any race, it was obviously necessary to add the exception, for betting could not, in the ordinary manner, or indeed practically at all, be carried on without entering or recording it. It would need very much stronger language than secs. 198 and 197 contain to warrant the accusation of stupidity to the Parliament which necessarily follows from holding those sections to be applicable to this case. And, if there were any doubt, ought the adjudication

to be of guilt; ought the Court not to leave it to Parliament to make its meaning plainer, before making any one a criminal, and subjecting him to a year's imprisonment in the central prison?

It is quite clear that, under sec. 204, it is lawful for the association to let, and the book-makers to use, the stalls or stands for the purpose of recording bets, and it may be that they were actually used for that purpose only, but the reserved case states that they were used for betting, though it would appear that the book-maker does not occupy the stall himself, but makes the bets without, and that his clerk or assistant makes the entries within, where the latter sits, being the only occupant. As I have said before, if the English cases are binding here, and if they make the conviction in question valid, it is only a question of the *modus operandi;* and that which is really struck at in this prosecution—book-making—can, by a simple change of the mode of operation, be made unquestionably lawful.

On the ground, therefore, that the defendant was not the keeper of a disorderly house, on the facts related in the reserved case, his conviction was, in my opinion, wrong and ought to be quashed.

I find nothing to the contrary in any of the cases in this Province. In *Hanrahan's* case, 5 Can. Cr. Cas. 430 3 O.L.R. 659, the accused was carrying on a business analagous to that of a bucket shop, some of the betting being upon races in a foreign country; he was carrying it on in a *house*, of which he was found to be the keeper; none of the observations contained in the judgments necessarily conflict with the views I have expressed. There is certainly nothing in sec. 204 which, by implication or otherwise, permits the keeping of a common betting house on a racecourse; but in this case there was no common betting house within the meaning of secs. 198 and 197; in that case, upon evidence sufficient to support the finding, it was found that there was. So, too, it is quite clear that the exception as to bets made on a racecourse is an exception to sec. 204, and of no aid to one who is guilty under the other sections; in that case it was proper to say so; in this case it is proper to say that the defendant has no need of any exception, until his case is brought within some rule. In *Walsh* v. *Trebilcock* (1894), 23 S.C.R. 695, I am unable to find anything bearing upon the question. In *Hendrie's* case,

10 Can. Cr. Cas. 298, 11 O.L.R. 202, it was not necessary to consider and the Court did not consider, whether or not there had been an infraction of the enactment, but considered that, if there had been, the accused was not a party to it. The Chief Justice in his opening remarks cannot have meant to say more, as to the effect of sec. 204, than was said in *Hanrahan's* case. Maclaren, J.A., was of opinion that the association, and not the book-makers, kept the enclosure in which the book-makers carried on their business, and that it was a common betting house; and that the book-makers would each be liable under sec. 198 (2), as a person who appeared to be the master, or to have the care, of the disorderly house. If the enclosure really were a disorderly house, I would be inclined to agree that the association opened and kept it for the purpose of betting between persons resorting thereto and persons using it, but would experience great difficulty in finding that the defendant appeared, or acted, as owner, or as the person having the care or management of the disorderly house; on the contrary, he appeared and acted as one of many who were there under the license and control of the association, and having no sort of care or management of the enclosure; he was not owner, occupier, or keeper of anything but the stall or stand to which he was assigned, and, unless each of these stalls or stands was a disorderly house, he would not be guilty. And in the *Stratford Turf Association's* case, 28 O.R. 579, the Court seems to have been of opinion that sec. 204 made betting on the racecourse of an incorporated association, during a race meeting, legal; if that be so, it must be by implication, as the provisions refer to recording bets and stake-holding only, and so is helpful to the defendant.

Conviction affirmed.

NOTE: The Courtof Appeal not having been unanimous in the decision arrived at, the defendants exercised their right of further appeal to the Supreme Court of Canada. The decision of the latter Court (March 1907) affirms the majority opinion above reported.

[COURT OF KING'S BENCH, QUEBEC.]

DISTRICT OF ST. FRANCIS.

BEFORE HUTCHINSON, J.

THE KING v. HARKNESS.

Vagrancy—Describing the offence—Disorderly conduct—Summary conviction—Cr. Code 1892, *secs.* 207, 208—*Revised Code* 1906, *secs.* 238, 239.

1. A conviction under the vagrancy clauses of the Criminal Code (former secs. 207, 208, now Revised Code secs. 238, 239) must find that the accused is a loose idle or disorderly person or vagrant and a conviction which merely declares that the accused was guilty of being drunk and causing a disturbance (sec. 238(*f*)) is invalid.

The information charged the accused with being drunk and causing a disturbance in a public street, under sec. 207 of the Criminal Code.

The accused was tried summarily before a justice of the peace and condemned to pay a fine of $50.00, and, in default thereof, to imprisonment for a term of six months.

Motion was made in chambers on the return of a writ of *habeas corpus* for the discharge of the said defendant under a warrant of commitment reciting the conviction as above mentioned.

J. S. Broderick, K.C., for the prisoner. Section 207 of the Criminal Code creates no such offence as the one charged against the prisoner; it only indicates one of the class of offenders named in the opening words of the section itself.

J. A. Leblanc, for the prosecution.

SHERBROOKE, QUE., December, 1906.

HUTCHINSON, J.:—I am of the opinion that the prisoner must be discharged from custody on the ground urged by the coun-

sel for the prisoner. Section 207(*f*) of the Code creates no offence but only indicates one of the many ways how a prisoner named may be "a loose, idle or disorderly person or vagrant," and that is the proper way to charge an offence under that section. To give jurisdiction to a justice of the peace on a summary conviction the information must charge that the accused is "a loose, idle or disorderly person or vagrant," and it is not sufficient to charge simply that the person was drunk and causing a disturbance in a public street, although that fact constitutes the person "a loose, idle or disorderly person or vagrant" by virtue of sec. 207 of the Code.

Prisoner discharged.

Note: *Vagrancy—Describing the offence—Rev. Code secs.* 238, 239.

The above decision is submitted with disapproval. Section 238 gives an enlarged statutory meaning to the word vagrant and includes with the definition many offences of varied description enumerated in its items (*a*) to (*l*) inclusive.

It would seem more in harmony with the procedure of the Code and with the fundamental principles of criminal law that the accused should be charged in the information with the precise offence of the particular item of the statutory definition relied upon. The better way would no doubt be to charge that the accused is a vagrant in that he was found wandering abroad not having any visible means of subsistence and not giving a good account of himself, or (as the case may be) in that he caused a disturbance in a public place by being drunk, or other specific offence set out in sec. 238.

Section 723 (3) declares that the description of any offence in the words of the Act creating the offence shall be sufficient, but this does not deprive the accused of his right to be informed of the nature, time and place of the offence to which he is called upon to plead.

It may also be observed that the mere fact of drunkenness in a street is not sufficient to create an offence under sec. 238 (*f*), nor would the drunkenness and the making of a disturbance combined necessarily bring the case under the vagrancy clauses.

Sub-section (*f*) declares a person a vagrant who causes a disturbance in a street, etc., by screaming, swearing or singing, or by being drunk, or by impeding or incommoding peaceable passengers. It is obvious that singing in a street road or public place is not necessarily a cause of disturbance and is not prohibited unless that result follows, and, in the same way, the state of drunkenness must cause a disturbance or it will not bring the drunken person within these sections of the Code. The offence of being drunk on a public street is a municipal one, regulated in many provinces by their municipal Acts and municipal by-laws passed thereunder.

[COURT OF KING'S BENCH, QUEBEC.]

(CROWN SIDE.)

BEFORE BOSSÉ, BLANCHET, TRENHOLME AND MADORE *ad hoc.* JJ.

THE KING v. HOULE.

Promissory note—Forgery—Corroborative evidence—Several forged endorsements—Cr. Code secs. 423, 684—*Revised Code secs.* 468, 1002.

1. Where a prisoner is charged with forgery, by writing three false signatures, as indorsements, on the back of a promissory note, and each of the parties whose signature is thus made to appear, swears that it is not his and is a forgery, there is the corroborative evidence required by article 684 of the Criminal Code (Revised sec. 1002) to make good a conviction.

MONTREAL, December 22, 1905.

TRENHOLME, J.:—This is an appeal in a criminal case that comes to us from the District of Bedford. The appellant Houle had been convicted by the District Magistrate of forgery, under the Criminal Code, and the question that has been submitted to us on his behalf in this appeal is, whether there is in the case, the corroborative evidence necessary to convict for forgery.

Forgery is one of those offences which, under the Criminal Code, cannot be established by a single witness. That witness's evidence must be corroborated in some material particular by other evidence, and the claim put forth here on behalf of the appellant is, that in the present case, that other corroborative evidence in the material particular does not exist, and that the evidence does not justify the conviction of forgery that has been found in this case by the District Magistrate.

The facts of the case as they appear in evidence and as they are stated by the appellant's counsel in his action are, that the document which Houle is charged with forging, is a promissory note, which promissory note is made payable to the order of one Arthur Mercier, who himself signs the note as maker, and endorsed on the back of this note are three names—Arthur Mercier, Pierre Mercier and Zephirin Mercier. This note Houle took to the Bank of Ottawa in Bedford, and discounted it there, and with the proceeds took up a previous note, which he was bound to take up, which was made by Arthur Mercier. Now, a charge of forgery is made against him charging him with forgery of that promissory note and particularly of the three endorsements on the back of it.

The evidence of the Merciers is to the effect that they never, any of them, signed that promissory note, or the three names on the back of the note, whether as endorsers or however it may be. Each of them swears positively that he never signed that promissory note.

The question is, with the evidence of the bank manager, that it was Houle that discounted the note and got the benefit of the proceeds of it, and with the evidence of these three Merciers each of whom swears that the note was never signed by him—whether we have in the evidence of the two Merciers, other than Arthur Mercier, evidence of corroboration required by the Criminal Code or not.

The charge against Houle is that of forging a promissory note. Now, what is forgery under our rule? The article of the

Criminal Code 442 defines forgery as the making of a false document, with the intent that it should be used or acted upon as genuine to the detriment of another. That is forgery, but that definition of forgery includes, as the article states, any material addition to the document, or any false attestation of the document. That is forgery, too, of a document. Therefore, forgery under law is simply the making of a false document and a party makes a false document when he makes any material part or addition, or attestation of that document false. That is forgery, and the question now before us is this: Is this promissory note as it was discounted by Houle at the bank a forgery, and is it legally established by corroborative evidence to have been done by the prisoner Houle?

The prisoner's counsel says it is true that Mercier the endorser swears it is not his signature, but no other witness swears that it is not his signature. There is no corroboration. Well, we cannot look at it in that way. We look upon this document as a whole. We see that in accordance with the definition of forgery it is a false document. Now, does the proof that that is a false document rest upon the evidence of only one witness? Does it or does it not? Well, we have these three witnesses, each of them swearing they never signed that document. Therefore we have the evidence of three men that that is a false document.

It does not rest simply on the evidence of Mercier, the first endorser; it does not rest on his evidence alone, because all three of them concur in swearing that the document is a false document. Therefore that promissory note as it was discounted, was a promissory note with those false signatures on it, and the document is impugned as a valid document by three witnesses, not by one. In addition to that, we have the evidence of the bank manager, who proves that it was Houle who discounted that note. Now, that proves that Houle intended that note to be used, because he used it himself. He certainly used it, and if it was a false note, it requires no proof to say that it was to the detriment of someone else the making of a false note, and

therefore we have, in the evidence of the bank manager, corroborative evidence of a material element in the proof of the forgery of a promissory note.

A ground on which we think the conviction should certainly be upheld is, that we have three witnesses all concurring and swearing that that note, taking it just as it was discounted by Houle is a false note, that it is not a genuine note and we think therefore that the conviction is right, but we would not say that it should be put upon the ground that Houle actually endorsed that note under the belief that he was endorsing a discharge. We think the prisoner's counsel right in saying that that is not proved in the case. Arthur Mercier swears he did not sign the note. Therefore we see no evidence to support that view, but as a court of criminal appeal we are bound to uphold this conviction if the evidence justifying the conviction is before us, and we think that it is, and we do not think that the conviction could be quashed because the District Magistrate might take a different view in arriving at the conviction, if the evidence justifying it really existed—if corroborative evidence existed in the record, and we think it does—and for these reasons the conviction is confirmed and the appeal dismissed.

Conviction affirmed.

W. K. McKeown and *E. W. Westover,* for the accused.
E. Lafontaine, K.C., for the Crown.

Note : *Corroboration in forgery cases—Cr. Code secs.* 423, 684—*Revised Cr. Code secs.* 468, 1002.

Section 1002 of the revised Criminal Code, 1906, R.S.C., ch. 146 is taken from sec. 684 of the Criminal Code of 1892.

Code sec. 684 originated with 32 & 33 Vict. ch. 19, sec. 54 (D.), which abolished the incapacity of interested witnesses, but with a proviso that the evidence of an "interested person" should be insufficient unless corroborated by "other legal evidence in support of the prosecution." The corroboration required by that statute was held not to be the corroboration of the

Note:—*Continued.*

Corroboration in forgery cases—Cr. Code secs. 423, 684—*Revised Cr. Code secs.* 468, 1002.

evidence of the person interested in every material particular, but the corroboration of it in some material particular tending to support the prosecution. *R.* v. *Bannerman* (1878), 43 U.C. Q.B. 547.

The Criminal Code abolished the distinction between interested and disinterested witnesses in this respect and declared that a conviction should not be made upon the evidence of one witness only unless corroborated in some material particular by evidence implicating the accused. Sec. 684.

On an indictment for forgery of prosecutor's name as endorser of a promissory note, the prosecutor swore that he had not endorsed the note; that it was not his writing; that he had never authorized the prisoner to sign his name to the note, and that he himself was unable to write his name, being in fact a marksman. A son of his also swore that his father was unable to write his name and was a marksman. Another witness also proved that he had known the prosecutor three or four years, and knew that he could not write. It was held that the evidence of the son and of the other witness to the effect that the prosecutor was unable to write his name was "other legal evidence in support of the prosecution" within the meaning of the section, and that it sufficiently corroborated the evidence of the prosecutor to sustain the conviction, and that the burden was then on the prisoner to shew as a defence that he was authorized to use or write the prosecutor's name. *R.* v. *Bannerman* (1878), 43 U.C.Q.B. 547.

In a charge of forgery, it was held that the corroboration must be that of another witness, and not merely the evidence of the same witness on another point. *R.* v. *McBride* (1895), 2 Can. Cr. Cas. 544, 26 Ont. R. 639.

A witness who testified that the forged signatures were written by the accused is not corroborated in a "material particular by evidence implicating the accused" by proof that certain other signatures were in the same handwriting, when the only evidence shewing that the latter signatures were written by the accused was the testimony of the same witness who had testified to

Note:—*Continued.*

Corroboration in forgery cases—Cr. Code secs. 423, 684—*Revised Cr. Code secs.* 468, 1002.

the handwriting of the signatures first mentioned. *R.* v. *McBride* (1895), 2 Can. Cr. Cas. 544 (Ont.).

In *Regina* v. *Giles* (1856), 6 U.C.C.P. 84, the prisoner, Elizabeth Giles was indicted for forging an order in the name of David Akenhead for the delivery of goods. The only witnesses who were examined at the trial were the person whose name was forged and the person to whom the order was addressed, and who delivered the goods on the forged order. The Court of Common Pleas (Draper, C.J., Richards and Hagarty, JJ.,) held that there was not sufficient evidence to support a conviction, having regard to the statute 10 & 11 Vict. ch. 9, sec. 21, by which the evidence (by that Act made admissible) of persons interested or supposed to be interested in respect of any writing given in evidence "shall in no case be deemed sufficient to sustain a conviction for any of the said offences, unless the same be corroborated by "other legal evidence in support of such prosecution." Draper, C.J., delivering the judgment of the Court, said:

> "There is the same and no other proof to go to the jury on either count to shew the order forged; that evidence is given by the party whose name is alleged to be forged and his denial is complete, adding as a circumstance, that he cannot write. But there is no corroboration of his testimony—*i.e.*, there is no one material fact proved by him which is proved either by other direct testimony or by the proof of other facts which go to establish the truth of any material part of his statements. The only other witness examined was the person who advanced goods on the faith of the order being genuine. He did not know that Akenhead could not write or he would not have accepted the order. He believed it genuine until some months after when Akenhead denied it. The false representation made by prisoner as to her own name would be a very material fact to establish a guilty knowledge on her part, if the fact that the note was forged were established; but until that is done this false statement wants significance, and I think it would be going too far to treat it as a corroboration of the statement of Akenhead that the order was a forgery."

[SUPREME COURT OF NEW BRUNSWICK.]

BEFORE TUCK, C.J., HANINGTON, BARKER AND McLEOD, JJ.

THE KING v. O. A. BATSON.

Canada Temperance Act—Certificate of previous conviction—Identity of defendant—Bias of convicting justice.

1. Where a certificate of a previous conviction of a person of the same name and description as the accused is put in evidence as proof of a previous conviction without specific evidence of identity and without any question of identity being raised, there is evidence upon which the magistrate may determine whether or not the accused was the person formerly convicted.
2. A conviction upon the pending charge with an increased penalty because of the accused having been previously convicted will not be quashed under such circumstances on the ground that identity was not proved.
3. A civil action brought by the accused against the magistrate for alleged misconduct as a judicial officer but in which the magistrate had not been served with process at the time the conviction was made, is not a cause of disqualification.

DECIDED: February 10, 1906.

Argument of order nisi granted by McLeod, J., to quash a conviction of the defendant for a third offence against the Canada Temperance Act. The order nisi was granted on four grounds, which are referred to in the judgment of the Court the alleged bias resulting, it was contended, from the fact tha an action by the defendant against the presiding justice for alleged misconduct as a judicial officer was pending. The writ in this action had been issued on June 24th, but was not serve until August. The trial of the defendant was begun on the 23rd of June, and the conviction was made on the 30th of June.

A motion to make absolute the order nisi was argued before Tuck, C.J., Hanington, Barker, and McLeod, J.J., in Michaelmas Term.

M. N. Cockburn, K.C., shewed cause.

A. I. Trueman, K.C., supported the order.

FREDERICTON, February 10, 1906.

The judgment of the Court was delivered by Tuck, C.J.:—As to the first ground, the magistrate had before him certificates of the previous convictions, and that is sufficient. In *Ex parte Phillips*, 26 N. B. R. 397, it is held that a certificate of a previous conviction for selling liquor under the Canada Temperance Act is sufficient evidence to prove the fact of such conviction. Sub-sec. (b) of sec. 115 puts this beyond a doubt. Next it is said there is no evidence to prove the identity of the person previously convicted with the accused. The certificate shewed the accused to have the same name and description, and it was for the magistrate to determine whether or not he was the same person. Besides, no such point was taken on the trial. If it had been, how readily could the evidence have been supplied!

The third objection is that the magistrate is disqualified on account of bias. The bias named is, that there was an action pending between Batson, the defendant, and Byron, the magistrate. The complete answer is that this action was not pending at the time the conviction was made. The magistrate had not been served.

Lastly, the contention is that the conviction is for an offence committed after the laying of the information. It seems to me that the evidence does not bear out this contention. The order must be discharged.

Conviction affirmed.

Note: *Proving previous summary conviction—Identity of persons accused—Cr. Code, sec.* 694.

Sub-section (*b*) of sec. 115 of the Canada Temperance Act, referred to in the above judgment, enacts that: "*The number* of such previous convictions shall be provable by the production of a certificate under the hand of the convicting justices or magistrate, or officer, or of the clerk of the peace, without proof of his signature or official character, *or* by other satisfactory evidence."

This sub-section of the special statute under which the prosecution was had does not appear to affect the question of proof

Note: *Proving previous summary conviction—Identity of persons accused—Cr. Code, sec.* 694.

of identity, and the Criminal Code would be applicable in so far as the special Act does not make a conflicting provision. See Code sec. 840.

Section 694 of the Code seems by its terms to require proof of identity for it provides, *inter alia*, that a copy of any summary conviction purporting to be signed by the clerk of the Court to which such summary conviction was returned shall, *upon proof of the identity* of the person of the offender, be sufficient evidence of such conviction without proof of the signature or official character of the person appearing to have signed the same.

The section is contained in Part LI. which deals with the subject of trials of indictable offences, and it also provides similarly for proof of previous convictions upon indictment. Some offences upon indictment have an increased penalty attached if they follow a previous summary conviction, and this probably explains the inclusion of the latter under the general heading of "Trials." It does not appear however that the effect of the section is limited to trials of indictable offences. If proof of identity of the person is required upon a trial of an indictable offence, it would be anomalous that such should be dispensed with, or left to be inferred from the similarity of name and description, upon the trial of an offence punishable only upon summary conviction.

Code sec. 694 seems to be declaratory of the common law that proof of identity must be given. The production of the original conviction, whether in a summary matter or upon indictment, would not aid in determining identity, and in dispensing with the production of the original, Parliament has placed on record its affirmance of the principle that the accused must be identified as the previous offender.

Even if sec. 694, as regards summary convictions, is construed as applicable to previous summary convictions certified by the officer to which they are *returned*, as regards their admission in evidence without proof of official signature, the clause as to proof of identity may have a wider and general application.

It may therefore be doubted whether the part of the decision in *Batson's Case* above reported which is summarized in head notes 1 and 2 will be generally followed.

[SUPREME COURT OF NEW BRUNSWICK.]

BEFORE TUCK, C.J., AND HANINGTON, LANDRY, BARKER AND McLEOD, JJ.

Ex parte GRUNDY.

Summary convictions—Issuing warrant of arrest—Information upon suspicion—Examining complainant and his witnesses—Proving grounds of suspicion and belief to obtain warrant—Quashing conviction because warrant of arrest issued without jurisdiction—Cr. Code secs. 558, 843, 845—*Revised Code* (1906) *secs.* 654, 710, 711.

1. A magistrate has no jurisdiction to issue a warrant of arrest in the first instance in proceedings under the Summary Convictions clauses of the Code (Part XV. of the Revised Code) upon an information pledging the informant's suspicions and belief, but not stating the grounds therefor, without first examining the informant or his witnesses as to the grounds of suspicion.

2. Where the attendance of the accused before the magistrate has been compelled by his illegal arrest upon a warrant issued without jurisdiction, and objection is taken on the hearing but overruled, the summary conviction will be quashed.

ARGUED: January 31, and February 1, 1906.

DECIDED: February 10, 1906.

In Michaelmas term, 1905, a rule was granted for a *certiorari* to remove and a rule *nisi* to quash an order of Carleton, J., Judge of the county court of the county of Madawaska, quashing on an appeal a conviction made by Barry R. Plant, Esquire, a justice of the peace for the said county of Madawaska, under the Dominion Summary Conviction Act in the matter of *The King* v. *Damas Lizotte* on the complaint of George G. Grundy, superintendent of the Temiscouata Railway Company.

The complaint sets out in his sworn information "that he has just cause to suspect and believe, and does suspect and believe that

Damas Lizotte, of the parish of Saint Francis, in the county of Madawaska, did, between the 1st day of September, A.D. 1904, and the 1st day of November, A.D. 1904, to wit, on or about the 7th day of October, A.D. 1904, wilfully leave open a certain gate in the railway line fence of the Temiscouata Railway Company situate along said line of railway where the said railway passes through the land of the said Damas Lizotte, in the parish of Saint Francis aforesaid, without some person being at or near said gate to prevent animals from passing through the said gate on to the said railway."

On this information, without any examination by the justice of the complainant or his witnesses as to the facts upon which the belief were founded, a warrant was issued and the defendant brought before the justice. At the trial, among other exceptions not material to this report, it was objected that there was no proper information, because it did not appear that the complainant had reasonable or probable ground for suspecting and believing that the accused committed the offence charged. The objections were overruled and the defendant was convicted. On appeal from this conviction Judge Carleton held that there was no proper information upon which a warrant could issue, and made an order quashing the conviction.

FREDERICTON, January 31, and February 1, 1906.

Laforest shewed cause against the rule *nisi* to quash the county Judge's order. He referred to *Ex parte Boyce*, 24 N.B.R. 347, and to *Dixon* v. *Wells*, 25 Q.B.D. 249, and *Blake* v. *Beech*, 1 Ex. D. 320.

Aaron Lawson, contra, argued that Code section 887 takes away the *certiorari* from the defendant, but not from the prosecutor. He referred to *Rex* v. *Davies*, 5 T.R. 626, and *Reg.* v. *E. McDonald*, 24 N.S.R. 44. The case of *Ex parte Boyce* was decided under a statute which required the informa-

tion to be under oath. It is different in informations under the Code. The magistrate may issue a summons or warrant without any oath; sections 843-845. [LANDRY, J.: Only in cases where no other provision is made; in this case other provision is made by section 558.] That only applies to indictable offences. [LANDRY, J.: Its provisions are made applicable to summary convictions by section 843.] It is not necessary that the examination by the magistrate as to the ground of the suspicion and belief should be under oath. It appears the magistrate did have information other than the complaint. Mr. Grundy, in answer to a question on cross-examination says: "I had further conversation with the magistrate, gave him the outlines and other information I had in reference to the case." [HANINGTON, J.: The statute means more than that. It says, "hear and consider the allegations of the complainant," *i.e.*, determine the matter judicially on proper testimony.] There being a sworn information and the defendant having appeared by counsel and defended the case, the conviction will not be quashed on *certiorari*: *Ex parte Sonier*, 2 Can. Crim. Cas. 121; *McGuiness* v. *Defoe*, 3 Can. Crim. Cas. 139; *Reg.* v. *McMillan*, 15 N.B.R. 110.

FREDERICTON, February 10, 1906.

The judgment of the Court was now delivered by

BARKER, J. (oral):—The information stated in general terms that the informant had reason to believe, and did suspect and believe that the party charged had committed an offence, without stating the grounds of his information, and apparently without making them known to the magistrate. On the application to Judge Carleton, and, after hearing the objection to the validity of the arrest argued, he delivered a somewhat lengthy and exhaustive judgment on the point, and, without going into the merits of the case or taking evidence or hearing the case further than to discuss that one point, he held that there had been no

proper information upon which a warrant could lawfully issue and the conviction was quashed on that ground.

At Michaelmas term application was made for *certiorari* to bring up the judgment of Judge Carleton to review it and the proceedings had before him. He relied principally upon *Ex parte Boyce,* 24 N.B.R. 247, and the counsel on the other side sought in consequence of some supposed changes of some section in the Criminal Code to distinguish that case from the present.

We think that Judge Carleton's judgment was quite right, not only on the authority of *Ex parte Boyce,* but also on the authority of *The King* v. *Mills*; *ex parte Coffon,* 37 N.B.R. 122, [*Ex parte Coffon,* 11 Can. Cr. Cas. 48], not cited on the argument, decided in this Court in 1905, where it was held by this Court as follows:—

> "A sworn information stating that the complainant has just cause to suspect, and does suspect and believe that the party charged had committed an offence against the Canada Temperance Act and triable under sections 558, 559 and 843 of the Criminal Code, 1892, will not authorize a justice to issue a warrant to arrest in the first instance. It is the duty of the justice, before issuing the warrant, to examine upon oath the complainant or his witnesses as to the facts upon which such suspicion and belief are founded, and to exercise his own judgment thereon."

Admittedly that was not done in this case, and the arrest under the warrant under those circumstances was illegal, and, therefore, the party charged was never properly before the convicting magistrate. The rule must be discharged.

Rule discharged, and county Judge's order sustained.

[COUNTY COURT JUDGE'S CRIMINAL COURT, HALIFAX.]

BEFORE HIS HONOUR W. B. WALLACE, COUNTY JUDGE.

THE KING v. DOYLE.

Indictment—Perjury — Knowledge of falsity — Recognizance to keep the peace—Inquiry—Irrelevant statement—Proving part of deposition not taken down by magistrate—Cr. Code secs. 145, 146, 959—*Revised Code* (1906) *secs.* 170, 174, 748.

1. An indictment or charge for perjury in which it is alleged that the accused committed perjury by falsely, wilfully and with intent to mislead the magistrate, swearing to a certain statement, involves a charge that the accused knew such statement to be false and will not be quashed for failure to more specifically charge such knowledge.

2. Upon a charge of perjury in respect of evidence taken by a magistrate on requiring sureties to keep the peace (Revised Code sec. 748(2) the false statement may be proved by oral testimony, although not recorded in the minutes of evidence then made by the magistrate.

ARGUED : July 27, 1906.
DECIDED : July 28, 1906.

Trial under the speedy trials part of the Criminal Code upon a charge of perjury. The charge was that the accused "did in the city of Halifax on the 13th of July, 1906, on the trial or hearing of a complaint against him before John MacDougall, Esquire, stipendiary magistrate in and for the county of Halifax in respect of a threat uttered by him to do bodily injury to one George Wright, commit perjury by falsely, wilfully, and with intent to mislead the said stipendiary magistrate, swearing to the effect that he, the said Augustus L. Doyle, did not write two certain letters produced and shewn to him at said trial or hearing."

HALIFAX, July 27, 1906.

R. E. Harris, K.C., and *J. A. Knight*, for the Crown.
W. B. A. Ritchie, K.C., and *W. J. O'Hearn*, for the prisoner.

HALIFAX, July 28, 1906.

WALLACE, Co. J.:—Counsel for the prisoner objected to the form of the charge and contended that an essential ingredient "that the accused at the time knew said statement was false," was omitted. I consider, however, that knowledge of the falsity is involved in the words "wilfully and with intent to mislead, etc." The charge is valid, as worded.

When the Crown sought to prove by witnesses who were present at the hearing before the magistrate the words used by the accused, counsel for the prisoner strongly objected to such testimony and contended that it was the duty of the magistrate to take minutes of the evidence given on the inquiry, and that the magistrate had taken down the evidence in writing which was a part of the record, and that no testimony could be given by other witnesses to amplify or contradict it. There would be, of course, no question as to the soundness of this contention if the inquiry before the magistrate had been in relation to an indictable offence and depositions had been taken and signed in the usual way. It is argued, however, that the same law applies where the complainant is merely seeking to have a man bound over to keep the peace. Sections 856, 590 (sub-sec. 3), and 959 are invoked in support of that view. But the inquiry in question took place in relation to a complaint made under subsection 2 of section 959. The provisions of Part LVIII. of the Code apply to that section so far as the same are applicable to proceedings under that section, but I do not think those provisions are applicable to the proceedings which took place before the magistrate in the present instance. There is no appeal from the decision of the magistrate in relation to an offence under this

sub-section: 45 L.J., Magistrates' Cases 95; Clarke's Magistrates' Manual, 4th ed., 740. See also sections 879 and 889 of the Code.

I do not think that the case of *Rex* v. *McGregor*, 10 Can. Cr. Cas. 313, is similar to the present case. In my opinion the evidence offered by the Crown from sources other than the notes taken by the magistrate is admissible.

The Crown has established that the prisoner went before the magistrate and in reply to a question on cross-examination: "Did you write these letters" (referring to certain letters produced which were subsequently admitted to have been written by him), stated at first that he did not believe that he wrote those letters, that they might be a copy of letters written by him. When the question was pressed again and again and an answer, "Yes" or "No" insisted upon the accused finally denied that he wrote the letters. The testimony as to the writing of the letters was not material in the inquiry before the magistrate.

If there were no other evidence in this case before me I would have no reasonable doubt as to the guilt of the prisoner, but other important evidence was elicited.

On behalf of the accused an effort was made to shew that he actually believed when the letters were shewn to him that they were not written by him, as he could not understand how the genuine letters could be in the possession of the person producing them, but that on finding by subsequent inquiry that they were the identical letters written by him he voluntarily went before the magistrate the next morning and stated that he had made a mistake and that the letters were written by him. The case of *Rex* v. *Wylde*, 6 C. & P. 380, is cited as a similar case. But in this class of cases the surrounding circumstances must always be considered in connection with the subsequent withdrawal of the first statement, in order to determine whether the original statement was made with knowledge of its falsity.

The evidence does not warrant me in finding that the prisoner did not believe on his examination that the letters in question were written by him. He had a fair opportunity to examine

them and did carefully examine one of them before his final denial was given. It is doubtful whether his later admission before the magistrate was prompted by a conscientious desire to rectify an innocent mistake. It is open to the suspicion that he might have feared a prosecution for perjury.

The real difficulty which the Crown had in this case was in endeavouring to shew that the false statement of the accused was made "with intent to mislead the magistrate." When the question with regard to the letters was first asked, the accused said: "I don't believe the papers produced are in my handwriting," and perhaps at that moment he was really uncertain about the matter. At this point the magistrate stopped the inquiry as to the letters, considering that any questions about letters had nothing to do with the inquiry then before him. It was after this decision of the magistrate that the accused being again pressed by counsel denied writing the letters. Although under the Code a person may commit perjury whether his evidence is material or not, yet it is important to bear in mind, in connection with the charge in this case, that the actual false statement denying the writing of the letters was made after the magistrate had declared in effect that evidence respecting the letters was immaterial and would not be received by him. If the subsequent false statement is considered in connection with the decision of the magistrate I cannot see how it can be maintained that the prisoner made the false statement with intent to mislead the magistrate. Instead of intending to mislead the magistrate it is more probable that the accused being sharply and persistently pressed by the cross-examiner for an answer, "Yes" or "No," eventually gave his denial to end the matter.

It sometimes happens that a witness in giving his evidence will be careful to tell the truth on all matters material to the issue, but on being asked a question obviously immaterial will be reckless in his answer. Without discussing the propriety of the introduction of the words in the Code, "whether such evidence is material or not," it is plain that the presence of these

words may often cause the committal of a person who, carelessly rather than with evil intent, gives an untrue answer to an obviously immaterial and impertinent question.

In the present case I do not find that the words used by the accused were used with intent to mislead the magistrate and under all the evidence in this case I find him not guilty, and order his discharge.

Defendant acquitted.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE WEATHERBE, C.J., TOWNSHEND, GRAHAM, RUSSELL, AND LONGLEY, JJ.

THE KING v. McLEOD.

Theft—Summary trial—Plea of guilty—Reducing charge to writing—Question to prisoner — Form of conviction — Surplusage — Cr. Code secs. 783, 785, 789, 790—Revised Code (1906) secs. 773, 777, 782, 783.

1. The extended jurisdiction given to magistrates of cities and towns under the Revised Code sec. 777 (former sec. 785) is not controlled by Code secs. 782 and 783 as regards the offences of theft, false pretences and receiving, where the value exceeds $10; and a magistrate having jurisdiction under sec. 777 may proceed to try such offences without the preliminary investigation required in the case of other magistrates whose jurisdiction depends upon sec. 773.

2. Where there is a valid conviction under the Revised Code sec. 777, the warrant of commitment thereunder need not recite that the charge was read over to the accused in conformity with sec. 778 before he was asked to plead, for the omission, if otherwise material, is cured by sec. 1130.

3. Where the charge upon a summary trial by consent without a jury is read to the accused, in the terms of the written information and his plea taken thereto, any objection to the order in which the statutory proceedings were taken is thereby waived.

ARGUED: February 10, 1906.

DECIDED: April 11, 1906.

Application in the nature of a *habeas corpus* for the discharge of defendant, who had been sentenced to a term of imprisonment in the penitentiary for stealing certain amalgam plates of the value of $200, the property of the Waverley Gold Mining Company.

HALIFAX, February 10, 1906.

J. J. Power, for the prisoner.

Drysdale, K.C., Attorney-General, and *A. G. Morrison*, for the Crown.

HALIFAX, April 11, 1906.

GRAHAM, E.J.:—The defendant was, for theft, sentenced to the penitentiary at Dorchester by the stipendiary magistrate of the city of Halifax.

This is an application in the nature of a *habeas corpus*, the prisoner still being within the limits of the Province.

A warrant of commitment has been returned, and the conviction has been brought up at the instance of the Attorney-General by appropriate proceedings. By sec. 539 of the Criminal Code, it is provided that every Court of general or quarter sessions of the peace has power to try any indictable offence except under certain sections in parts 4, 7, 8, 9, 18, 21, 23, 29, 40, and corrupt practices under the Elections Act. They are mainly treason etc., seditious offences, etc., piracy, judicial corruption, etc., murder, etc., rape, etc. libel and combinations in restraint of trade.

The Court of the general sessions of the peace in Ontario thus has jurisdiction in respect to most of the ordinary crimes mentioned in the Code; receiving stolen goods under part 25, all kinds of thefts, from secs. 319 to 357; obtaining property by

false pretences, secs. 358-363; fraud, secs. 364-396; robbery, burglary, forgery, and so on.

By sec. 785, it is provided that if any person is charged in the Province of Ontario, before a police magistrate, or before a stipendiary magistrate, in any county . . . with having committed any offence, for which he may be tried at a Court of general sessions of the peace . . . such person may, with his own consent, be tried before such magistrate, and may, if found guilty, be sentenced . . . to the same punishment as he would have been liable to if he had been tried before the Court of general sessions of the peace. (2) This section shall apply also to police and stipendiary magistrates of cities and incorporated towns in every other part of Canada.

Sections 787 and 788 do not extend or apply to cases tried under this section, but where the magistrate has jurisdiction by virtue of this section only, no person shall be summarily tried thereunder without his own consent. So that it is to this provision that the police and stipendiary magistrates of cities and towns look for their jurisdiction. By sec. 783, jurisdiction is conferred on magistrates to try in a summary way thefts, obtaining property by false pretences, or receiving stolen property, when the value of the property in each case does not exceed $10, certain aggravated assaults, and certain offences connected with houses of ill-fame, and with betting. Sections 787 and 788 deal with the punishments for these offences.

The city and town stipendiary magistrates having the larger power conferred under sec. 784, viz., in respect to these and other offences, are not dependent upon sec. 783 for jurisdiction. Apparently they may proceed under sec. 784 in respect to any of them in which consent is not necessary. But sec. 783 is mainly directed to conferring jurisdiction in respect to certain petty offences, upon magistrates other than city or town police or stipendiary magistrates. By sec. 786 procedure is provided for obtaining consent and for proceeding in cases where consent is

not required under secs. 783, 784, and 785, for all tribunals acting under those sections.

Then secs. 789 and 790 provide for the special cases of thefts, obtaining property by false pretences, or receiving stolen property when the value of the property exceeds ten dollars—the complement of sec. 783 (*a*)—but they only enable the magistrate to dispose of the case where the defendant pleads guilty. The magistrate is not to try him; and hence apply only to magistrates other than city or town stipendiary magistrates who are not, as I shall shew, so restricted.

The stipendiary magistrate for the city of Halifax who *disposed* of this case has jurisdiction under sec. 785, and purported to follow the procedure under sec. 786.

It is contended that he should have proceeded under sec. 789, at least that his commitment shews that he did not do so. I think that the opinion of Ritchie, J., in *Rex* v. *Bowers*, 6 Can. Crim. Cas. 264, is correct, and that secs. 786 and 790 are not applicable to stipendiary magistrates for cities and towns who have a much larger jurisdiction, but are only applicable to magistrates enumerated in the interpretation section other than city and town police and stipendiary magistrates. There could be no possible reason for requiring from the city and town magistrates the application of safeguards in behalf of a prisoner charged with theft, or obtaining property by false pretences, or unlawfully receiving stolen property, which were not required in respect to the disposal of other more serious offences, such as robbery, burglary, forgery, and so on. Whereas if it is regarded as a section extending the powers of an ordinary magistrate to enable him to dispose of a case when the prisoner wishes to plead guilty, the necessity for safeguards for that tribunal, and in that kind of case, is obvious and will be found provided there.

If sec. 789 applies to the city and town stipendiary magistrates, sec. 790 being verbally linked with it, must also apply to them. But this would cut down the jurisdiction already con-

fered by sec. 785, when enables them to try with consent "any offence" which the Court of general sessions may try, inasmuch as under sec. 790 the magistrate has not power to try a prisoner at all, but only to dispose of the case if he pleads guilty. Why should the statute enable the city magistrate to try robbery, burglary, forgery, and so on, but prevent him from trying theft, obtaining property by false pretences, and receiving stolen property? The earlier history of these provisions makes the point very plain; sec. 783 was contained in 32 & 33 Vict. ch. 32, sec. 27; sec. 785 was passed by 38 Vict. ch. 47, sec. 1. Before the amendment of 1900, [sec. 785 (3)], was passed, a similar contention was made, viz., that a stipendiary, or police magistrate, in Ontario, having this jurisdiction was, when he tried an aggrevated assault, restricted under sec. 783(*c*), and sec. 788 to the infliction of a maximum sentence of six months. And there were the same general words which we have in sec. 789: "Whenever any person is charged before a magistrate with having committed an aggravated assault," etc. But it was held in *Regina* v. *Archibald*, 4 Can. Crim. Cas. 159, that this tribunal was not restricted to sentences of six months, but could impose a sentence as great as could be imposed on a trial at the general sessions of the peace. Then it might have been contended with equal force that the general words in sec. 785 as to the punishment would be controlled by the special punishment provided for an aggravated assault under secs. 783-788. But the Court, evidently having in view the two different tribunals, held that the punishment in sec. 785 was not controlled by those sections, which as to that had reference to ordinary magistrates. I refer also to *In re Boucher*, 4 Ont. App. R. 197; *Regina* v. *Conlin*, 29 Ont. R. 28. While parliament, following that decision, expressly provided *ex majore cautelâ* that secs. 787 and 788 should not apply to stipendiary magistrates of cities or towns, namely, to restrict their sentences to the shorter period, it did not pass a similar provision in respect to secs. 789 and 790. I think that these sections so obviously apply to the matters and the tribunal which

I have indicated that it was not thought necessary to pass such a provision.

Another point was taken by the defendant's counsel namely, that the warrant of commitment was bad on its face because it did not disclose that the requirements of the procedure indicated in sec. 786 had been complied with. First, that the substance of the charge was not stated to the prisoner before the question was asked as to his consent to be tried by him, although it is to be implied from the language of the commitment that he did so, and second that the charge was not read to the defendant before he was asked to plead to it. But I think it is not material to inquire whether the warrant of commitment was defective or not in this respect, because there is a good conviction, and one which alleges that the defendant has been convicted. It is as follows:

> "Be it remembered, that on the fourth day of January, in the year one thousand nine hundred and six, at Halifax, in the city of Halifax, in the Province of Nova Scotia Canada, Frederick McLeod being charged before me, the undersigned, George H. Fielding, Esquire, stipendiary magistrate in and for the said city of Halifax, exercising jurisdiction under the provisions of the Criminal Code of 1892 and amendments thereto, in respect to the summary trial of indictable offences, and the said Frederick McLeod being charged before me with the offences herein recited, and consenting to my trying the charge summarily, for that he, the said Frederick McLeod, did in the said city of Halifax, on or about the twenty-third day of November in the year of our Lord one thousand nine hundred and five, unlawfully steal eight large copper amalgam plates, and a number of smaller copper plates, with a quantity of gold amalgam therein of the value of two hundred dollars, or thereabouts, the property of the Waverley Mining and Electric Power Company, a body corporate, and the said charge having been stated by me to him in open Court,' and the

said Frederick McLeod pleading guilty to said charge, is thereupon at the time and place aforesaid convicted before me of the said offence, and I adjudge him the said Frederick McLeod for his offence to be imprisoned in the penitentiary at Dorchester, in the Province of New Brunswick, in Canada, for the period of three years from the fourth day of January, in the year of our Lord one thousand nine hundred and six.

"Given under my hand and seal, the day and year first above mentioned, at Halifax aforesaid."

Geo. H. Fielding (L.S.), stipendiary magistrate.

By sec. 800 it is provided as follows: "No conviction, sentence or proceeding under the provisions of this part shall be quashed for want of form. And no warrant of commitment upon a conviction shall be held void by reason of any defect therein, if it is therein alleged that the offender has been convicted, and there is a good and valid conviction to sustain the same."

A form of conviction which may be followed has been provided. Section 807. "Every conviction . . . may be in the form QQ., RR., or SS. in schedule one hereto applicable to the case, or to the like effect," etc. These forms are applicable to sec. 786. Form QQ. must be applicable to it, for sec. 790 does not contemplate a trial, and form RR. is applicable to both sections. I rely on the word "every" in sec. 807. Now, in this form RR., there is no recital of the fact of stating the substance of the charge, or of reading the charge to the prisoner at any time; it is not required. To use Lord Kenyon's words in a case I shall cite presently, "the Act says that the conviction need not contain it." The form used by the stipendiary magistrate includes all that is in the statutory form; it includes more, and what is unnecessary, but nothing which shews that the magistrate had not jurisdiction.

In *Regina* v. *Hogarth*, 24 Ont. R. 63, the Court declined to express an opinion that the consent of the defendant to be tried

summarily not appearing on the conviction, would of itself have been a sufficient ground for quashing the conviction.

In *Regina* v. *Burtress*, 3 Can. Crim. Cas. 536, it was expressly decided that the consent need not appear in the conviction. *Regina* v. *Cockshott*, [1898] 1 Q.B. 582, is distinguishable. There was no form of conviction in the Act 42 & 43 Vict. ch. 49 (Imp.) as there is here. It appeared by the affidavit affirmatively that the defendant was not informed of his right to be tried by a jury in that case. The affidavit of Mr. Morrison, the prosecuting officer, however, after dealing with some details has the following paragraph: "I say that the said stipendiary magistrate complied in every respect with sec. 786 of the Criminal Code on the trial of the said Frederick McLeod." The affidavit of the defendant was directed to facts tending to shew a non-compliance with sec. 789 of the Criminal Code, and has this general statement no doubt framed in that view: "The said warrant correctly sets forth the order and all the proceedings taken to secure my conviction under said warrant." Even if that allegation had in view the requirements of sec. 786, the deponent would not be in a position to notice very closely whether the magistrate had complied with sec. 786. He does not allege that the substance of the charge was not stated to him before he was asked as to his consent to be tried before the stipendiary magistrate, nor that the charge was not read to him before he was asked to plead to it. I would unhesitatingly adopt Mr. Morrison's affidavit, and rely upon the presumption also as to the ordinary course having been adopted.

The conviction on its face is good. In Paley on Convictions, p. 191, it is said:

> "Thirdly, if any particular form be prescribed as indispensably necessary, that must be strictly complied with, but if the Act only declares that the magistrate may draw up the conviction in due form, or to the effect there exemplified, then, provided the conviction contains everything required by the form given, it will not be vitiated by un-

necessarily stating more than is required. Thus, under 31 Geo. III. ch. 21, which by sec. 4 directed the conviction to be drawn up according to a form there specified, or to the effect thereof, the magistrate, having besides all the requisite particulars, unnecessarily inserted what was not required by the specified form, viz., the information, summons, appearance, and names of the witnesses, but not the evidence, it was objected that the conviction was neither good at common law for want of setting out the evidence, nor by the statute, as it did not strictly follow the form there directed, but the objection was overruled, because it was held that as the conviction contained all that the form required, it was not invalidated by stating what was unnecessary."

For that the case of *Rex* v. *Jeffries*, 4 T.R. 768, is cited. Lord Kenyon there said: "There is no doubt but that this is a faulty conviction at common law for the reason given." Then he refers to the statute permitting the use of the form, and adds: "And it appears by the form which is immediately subjoined that neither the case nor the evidence need be stated. The question, therefore, is whether the conviction now returned to us be not to the effect stated in the Act? I think that it is, for it contains everything that is important in the form given and something more. It states the information . . . but not the evidence itself, but the Act says that the conviction need not contain the evidence. The want of the very thing which the statute says need not be done constitutes the objection. I think that the magistrate has done everything that is required." To resume the quotation from Paley on Convictions, p. 192:

"The last observation leads us to take notice of a general maxim applicable to convictions in common with all other legal forms, viz., that any defect in the manner of stating that which is itself surplusage, and might be omitted altogether, does not vitiate the rest which is sound. Under this article may also be noticed that an impossible or incon-

gruous date, if the conviction be complete without it, may be rejected as surplusage and will not hurt."

I also refer to the case of *Charter* v. *Graeme*, 13 Q.B. at 227.

In *The King* v. *Hall*, 1 T.R. 320, after setting out the justice's conviction under 22 Car. 2, ch. 1, it is stated that:

"Bearcroft took several objections to this conviction . . . ."

It appears that the evidence was not given in the presence of the defendant which it ought to have been. The defendant should have been called on to plead to the charge before any evidence was received, but, instead of that, the justice read over improper evidence, which should not have been given, and then called on the defendant to answer the premises, by which means the defendant was confounded and induced to plead guilty.

The information does not contain a charge within the statute of the 22 Car. 2, ch. 1, upon which the justice professes to convict . . . Now, though this information professes to set out an offence against the 22 Car. 2, yet it is not confined to that statute only, but negatives several exceptions under the statute 1 W. & M., ch. 18. Therefore, though it were not necessary for the prosecutor to negative any of the exceptions under the latter Act, yet having undertaken so to do the omission of any one is fatal. The information has negatived those in the 19th clause of the 1 W. & M., ch. 18, but has omitted that in the 3rd section of the same statute, for it is not stated "that he did not take oaths and subscribe the declaration, etc., by which he would have been indemnified."

The Court: . .

The 2nd is cured by the defendants having pleaded guilty.

As to the 3rd and last, this is a conviction on the 22 Car. 2, therefore, the prosecutor need not have negatived

any of the exceptions in the statute 1 W. & M., ch. 18, and they may be rejected as surplusage. For if a subsequent statute made an exception to a former, it is incumbent on the defendant to shew by way of defence that he comes within such exception . . . Conviction affirmed."

In my opinion, for the reasons given, the application of the prisoner should be dismissed.

RUSSELL, J.:—It has been decided at Chambers by the late Mr. Justice Ritchie, in *Rex* v. *Bowers*, 6 Can. Crim. Cas. 264, that the stipendiary magistrate of Halifax has the power under sec. 785 of the Criminal Code, as amended by ch. 46 of the Acts of 1900, to try with the assent of the accused any of the offences defined by secs. 539 and 540, which cover all indictable offences other than those excepted by the said sections, the offence for which defendant was convicted not being included among the exceptions.

The argument for the defendant seems to be that, because the case might have been dealt with under section 789, and because section 789 is the one in which the offence of which the defendant was convicted, is specifically described, the Crown could only proceed under that section, although the offence, but for the insertion of section 789 in the statute, would have been included among those provided for by section 785 of the Code, although not specifically named therein. In support of this contention the question is asked, why, if this is not the case, should section 789 have been inserted in that Act at all?

The only answer I can suggest is, that sec. 786 provides for the case where the stipendiary magistrate proposes in the first instance to try the case summarily, while sec. 789 in its original form in the Criminal Code of 1892, applied where he did not so propose in the first instance, but discovered after entering on the preliminary inquiry that the case was a proper one for a summary trial by consent.

By the amendment of 1900, ch. 46, the magistrate, even where

the defendant consents to be tried under sec. 789, can only accept a plea of guilty. If the defendant pleads not guilty, he is remanded for trial in the ordinary way. But this was not the effect of the section as it stood in the Code in 1892. If the trial had been under section 789, I would have agreed that the jurisdiction to try by consent was not complete.

If the trial was held under section 785, the magistrate had, I think, the power to proceed with the trial, with the consent of the accused, without entering upon any preliminary examination, such as might be required under section 789. Section 786 says that the magistrate, after ascertaining the nature and extent of the charge, "but before the formal examination of the witnesses" for the prosecution, and before calling on the person charged for any statement which he wishes to make, shall state to such person the substance of the charge, etc.

It is contended that he did not conform to the requirements of this section. The proceedings set out are certainly not those prescribed in the statute, that is, they are not in the order prescribed by the statute, but I think that they are sufficiently in accordance with the requirements of the statute to be considered as defective in form only.

The essential thing is that the accused should be consenting to the summary trial of his case, knowing the nature and particulars of the charge to be tried, and being aware of his right to be tried by a jury at a time and place named.

Reading the record strictly, it may be that it is not stated that the charge was read to him before he gave his consent to a summary trial, and it is, therefore, possible that he may not have known, when he first gave his consent, the precise terms in which the offence was charged, but it was afterwards read to him precisely in the terms of the information, which was in writing, which, the magistrate unnecessarily says, was adopted by the Crown, and, what is more to the purpose, which was undoubtedly adopted by the magistrate, and the accused then pleaded guilty to the charge.

I think it is not competent for him thereafter to say that he was unaware of the nature and particulars of the charge. He was consenting throughout to the proceedings, and if his consent in the first instance had been given under any misapprehension as to the nature of the charge, of which however there is here no pretence, he should instead of pleading guilty have made some effort to withdraw his consent. In other words, where the objection is solely to the order in which the statutory proceedings were taken, I think the defendant waived the departure of the magistrate from the order prescribed by the statute.

LONGLEY, J.:—In this case the defendant was brought before Mr. Fielding, the stipendiary magistrate of the city of Halifax, charged with stealing amalgam plates with gold thereon of the value of two hundred dollars, the property, etc. He was brought before the stipendiary charged with the offence, and informed by the Court of his right to be tried before a jury, and asked if he consented to be tried before the magistrate, or desired to be tried before a jury at the ensuing criminal term of the Supreme Court of Halifax, whereupon the defendant consented to be tried before the stipendiary summarily without a jury, and the said defendant being then before such stipendiary, having jurisdiction to try under Part LV. of the Code and amendments, and said defendant declaring himself ready for trial, and the Crown preferring as a charge against him the charge under which he had been arrested, the defendant was arraigned on such charge, and the same having been stated to him in writing by the said magistrate, he pleaded guilty to the said charge, whereupon the magistrate convicted him and sentenced him to three years in the penitentiary. A motion was made for *habeas corpus* (the prisoner not having yet been transferred to Dorchester) to this Court on the ground that, under section 789 of the Code, before jurisdiction to try could have been obtained, there must have been evidence in support of the prosecution sufficient in

the opinion of the magistrate to put the accused upon his trial for the offence charged, and in this case such preliminary enquiry had not been made. A British Columbia case was cited in support of this, *R.* v. *Williams*, 10 Can. Cr. Cas. 330. The case cited is authority for the position that when a prisoner is brought before an ordinary stipendiary magistrate, charged with stealing property exceeding $10 in value, it is necessary to hold this preliminary enquiry, but that is not the condition of things in this instance. The stipendiary magistrate of the city of Halifax, by an amendment to the Code passed 1900, ch. 46, is made one of the class of magistrates who are given authority to act under the provisions of section 785 of the Code, and, with the consent of the accused, may try any offence for which a person may be tried by the Court of general sessions of the peace in Ontario. This seems to me clear, and therefore no preliminary enquiry is necessary in order to enable the stipendiary magistrate of Halifax city to arraign a person charged with theft, and, after obtaining his consent proceed to try him. I think there is no reason for interfering in any way with the conviction on this ground.

In his reply, the counsel professing to act for the prisoner alleged that, even under sections 785 and 786, the stipendiary magistrate had not complied with all the formalities of sec. 786. I think, in reading his report, that he did, and that the report of what he did conforms to the spirit and purpose of sections 785 and 786, and that a conviction being had, the prisoner in the case pleading guilty, section 800 is effective to cure any slight defect in form. In this case I do not observe any defects in form and I think the conviction should be sustained.

TOWNSEND, J.:—I have had much difficulty in reaching a conclusion in this matter, chiefly in respect of sec. 789.

If not exclusively applicable to a case of this kind, and the only one under which defendant could be sentenced when he pleads guilty, for what purpose was it enacted? On considera-

tion, I think the explanation suggested in the opinion of Russell, J., is satisfactory, and that the stipendiary could properly try and sentence the accused on a plea of guilty under sec. 785.

WEATHERBE, C.J. (dissenting):—The only section of the Code in which the crime with which the prisoner was charged can be said to be strictly described is 789, and to that section the magistrate or any lawyer would, in the first place at any rate, turn his attention upon being required to administer the law. This deals with three instances of unlawfully obtaining property exceeding in value ten dollars, viz., by stealing, by false pretences, and by receiving stolen property. And the method of obtaining jurisdiction is here provided by which these crimes are to be dealt with. Why the legislature singled out these crimes for a different method of treatment from all other crimes it is unnecessary to say, and certainly we need not enquire in discharge of our present duty. The question is whether a magistrate can turn aside from the specific and simple direction given him to deal with prisoners charged with these three crimes. If I understand the argument for declining to follow this direction it is this, viz., because though the value of the property criminally obtained is limited here by the Act, it is not the less stealing, and jurisdiction is given to a magistrate to deal in Halifax with any crime triable before the sessions in Ontario, of which stealing is said to be one. Therefore the magistrate, who would find directions aptly framed to deal with the case in sec. 789, should abandon the direction of the legislature and turn to other sections. If we admit that the magistrate may ignore this section, it must be admitted there was no necessity or reason or object in establishing this method of dealing with these specific charges.

Section 789 provides in the case of a person charged with these, and only these, three special offences, that where "the evidence in support of the prosecution is, in the opinion of the magistrate, sufficient to put the person on his trial for the offence charged, such magistrate, if the case appears to him to be one

which may properly be disposed of in a summary way, shall reduce the charge to writing, and shall read it to the person . . and shall then put to him the question mentioned in sec. 786, and shall explain to him that he is not obliged to plead or answer before such magistrate," and that if he does not plead or answer he will be committed for trial in the usual course. The question referred to above in sec. 786 is : "Do you consent that the charge against you shall be tried by me, or do you desire that it shall be sent for trial by a jury at the (naming the court," etc.) ?

Before the charge is to be reduced to writing, two things must appear to the magistrate to give him jurisdiction to proceed: 1st, that the evidence against the prisoner is sufficient to put the person upon trial; and 2nd, that the case is one which may be disposed of in a summary way. The magistrate shall then reduce the charge to writing, I suppose in order that a record may remain; the charge so reduced shall be read to the prisoner; he "shall then put to him the question" above quoted; but, before the answer, after putting the question, he shall "explain to him that he is not obliged to plead or answer before such magistrate, and that if he does not plead or answer he will be committed for trial in the usual course."

If the party consents the magistrate shall then ask him if he is guilty of the charge. If he plead guilty, the magistrate shall cause a plea of guilty to be entered before sentencing the prisoner. I think it not quite fair to the framer of this amendment section and the following to profess to some difficulty in knowing what to do with it. I must confess I find none whatever. It was clearly intended in the first place only for the three cases carved out to be dealt with in this peculiar manner. The most striking feature of these prominent sections which stares us in the face, and which seems to have been overlooked, is that they are not framed with a view to an actual trial at all. They are peculiar in this respect. It has seemed to me that it was supposed they should be avoided and ignored on account of

this very quality as an imperfection. It has been distinctly said so. Why, it has been said if a prisoner pleads not guilty how can you get on? What are you to do? On this account it has been said the magistrate may, if he sees fit, ignore this provision as if it had never been enacted.

The great difficulty with the prosecution is to know what answer to make to the question of a prisoner who, it must be admitted, comes exactly within the terms of sec. 789.

This is the question in effect that the prisoner is now putting to us from the jail: "Why have I not been afforded the benefit of sec. 789?" For my part, I cannot see why he has been deprived of that very provision which exactly fits his circumstances. It fits only his and the like cases, and it fits no other but these limited cases. No one can tell him why the legislature is to be defeated in the neglect of the directions afforded for this particular class of prisoner. I have asked in vain, Is this provision to be used in any case, and if so, in what case? The language is plain—when a person is charged before a magistrate with stealing property in excess of $10, and with sufficient evidence to put him on trial, if the magistrate thinks the case fit to be tried in a summary way, he is to proceed. That is this very case.

This prisoner was charged before the magistrate with this very crime, and he deemed it a case fit to be tried in a summary way.

What then had the magistrate to do? Why, to ascertain two things: whether the prisoner was willing to be there put upon trial, and intended to plead guilty. If not, that was the end of the section. It became functus. But this prisoner did intend to be there put upon trial, and to plead guilty. As I said, there is no provision in the section for a contested trial. It is peculiar in that respect.

The section is only intended for the very case now before us where a matter of form only was required. Here was a pris-

oner exactly fitted to the provision, who wanted to go through the forms only and receive his sentence.

Can any one say why the distinct provision which everyone admits is intended for this case, and cannot be applied to any but the three special offences named in the first four lines of the section—language which cannot be found anywhere else in the Code—can any one give a reason how it can be ignored in the case of this prisoner?

I understand it is not denied that the magistrate might if he saw fit, have given this prisoner the benefit of this section, and sentenced him under the next one, but it seems to be thought that he was not bound to do so.

I understand there is no other case to which the magistrate can apply this sec. 789—this and the two other offences. But the contention seems to be that while he refuses to apply them to this prisoner, he may give the next one the benefit of the sections. Either this must be the solution of the matter, or it can never be applied to any prisoner, and must be declared a dead letter. I am utterly unable to see why it is not to be applied to every case of these three charges—that is where the prisoners are ready to forego a contested trial and plead guilty. It was clearly framed for that. Yes, it is said, but the magistrate had the option to take it or leave it.

One will hardly be asked how is the magistrate to know whether the prisoner before him is one contemplated by the legislature. The answer is plain. He looks at the warrant containing the charge. If the charge comes within the words of sec. 789, a few minutes of enquiry puts the prisoner through the test, and if he declines to plead guilty, the prisoner is to be submitted to the ordinary practice for committal.

In effect the section simply says that every one charged with stealing, receiving stolen goods, or obtaining by false pretences, money to exceed in value ten dollars, shall be submitted to the ordinary proceedings for committal, unless they consent to waive a contested trial, and plead guilty as this prisoner did. No one

can point out any other special offence in the entire Code which may be treated in this manner. And the very language of secs. 789 and 790 absolutely forbids anyone charged with these three offences from being tried in a summary way under secs. 785 and 786. The language is: If he says he is not guilty, he shall be remanded to gaol to await his trial in the usual course. If who says he is not guilty? This very prisoner who now claims that he has been illegally dealt with. I have had more or less experience of hearing discussions touching the interpretation of statutes; but this case, I think, is peculiar, if we are to hold that secs. 789 and 790 are to be put out of use by the Court.

It is not denied that it was reasonable for the legislature, while giving the magistrate power to try and punish certain offences, whether the prisoner pleaded guilty or not guilty—that is, having once entered upon enquiry, and obtained consent to finally dispose of the cases, that in other limited cases that jurisdiction should be given only to punish where there was a plea of guilty (after consent obtained to deal with the case), and upon a plea of not guilty to extinguish the magistrate's jurisdiction, and transfer the case to the Supreme Court.

It was not, I understand, denied by the Attorney-General that the charge against the prisoner is the one precisely described in sec. 789, nor that the magistrate was proceeding to obtain the prisoner's consent to dispose of that charge, and did obtain that consent, and that the same magistrate on the same occasion applied to the prisoner to know whether he was guilty or not guilty, and that the prisoner pleaded guilty. It is not denied, if it were clear that the magistrate had proceeded according to the directions laid down in sec. 789 to obtain that plea of guilty, that he might then have sentenced him under sec. 790. I approve of this, and if such a case were to take place to-morrow, I suppose we should hold the conviction good. But the argument on the part of the Crown is that the magistrate having happened to bring this case defined in sec. 789 before himself with the book opened at secs. 785 and 786, and having evidently, by what ap-

pears on the record, tried him under those clauses, that trial is sufficient. Of course if there had been a plea of not guilty, I suppose the jurisdiction would not have been cut short as in the case of such a plea under sec. 789. This I suppose is peculiar. If it were clear the legislature had given the magistrate the power to try one section or the other, it would be necessary to do so in the most unequivocal manner. Here the offence is confined and limited, and defined and carved out of the general offences provided for in other sections, and we have the express declaration at the end of each section 789 and 790, shewing affirmatively that in case of a refusal to plead, or a plea of not guilty, he must be committed, and await his trial in the usual course.

Under secs. 785 and 786, for the offences there provided, the consent once given, and a plea of not guilty being made, the examination of witnesses for and against the prisoner must be heard and the case fully and finally tried and disposed of. It does not appear in the return before us that the statute in any one particular was complied with. For these reasons, I think it unnecessary to refer to the cases cited and discussed before us in offering the opinion that the prisoner cannot be retained.

Notwithstanding what I have with deference submitted, it seems to be contended that the accused was tried under secs. 785 and 786, which I have done my best to make plain were not the clauses of the Code intended to afford jurisdiction in the case. I am not sure what the magistrate was doing with the case before him. However, if these sections really were applicable, it is clear that the proceedings set forth in that case were not taken. It is not pretended they were, but only that they ought to be sufficient.

Under sec. 786 the magistrate must ascertain the nature and extent of the charge. Though it may not be necessary to enquire, it may be asked if this is to be found by the same method as the magistrate is to satisfy himself under sec. 789, whether the evi-

dence is sufficient to put the accused on his trial for the offence charged, and whether the case is one which may be disposed of in a summary way. One thing is very clear, that this must be ascertained before the formal examination of witnesses in both instances. It must be also before calling on him for any statement that the magistrate shall state to the accused the substance of the charge against him. It will be observed that under sec. 789 the charge must be reduced to writing and read to the prisoner before his consent can be asked for. It is, I think, not obvious how the accused could possibly give any consent without knowing what crime he is charged with. Nobody so far as I have heard has tried to explain it.

It cannot escape the notice, I think, of anyone familiar with the growth of our criminal jurisprudence, those especially of our ablest and most experienced practitioners, what a revolution has taken place in what was called the right of trial by jury. Can anything be more important than the method by which an accused person is to be deprived of that right? Layman and those inexperienced in the law may think the matter of little importance. One thing stands clear that language should be construed most strictly in favour of the accused. It would lead to evil results if he should be held to be competent to consent to waive the right of jury trial if he did not understand correctly the charge against him.

I am not aware, and I suppose we are not now concerned, how far the magistrate is to go beyond the language in the warrant, or whether it might be considered sufficient to state the charge in the terms of the warrant. In some cases of course that language might be very difficult to understand, and might be considered voluminous and technical to a layman, but all this deserves the closest attention by one filling the responsible office of magistrate. No clauses deserve his attention more than those in this part of the Code. The magistrate shall, after having stated the charge, say to him the important words, or words to the like effect, as those in sec. 786, enquiring whether accused consents

that this charge shall be tried by the magistrate or be sent for trial by a jury.

I think the entire jurisdiction in the mind of the legislature depended upon a strict and substantial compliance with the statement of this charge and the reply of the accused. From that moment the position of the accused is entirely changed. The proceedings afterwards depend, I think, upon a somewhat different method of interpretation.

I will now enquire as to whether it is necessary in the record to disclose how the nature and extent of the charge is to be ascertained, or whether it is necessary that the record should shew that they have been ascertained. Neither the charge nor the substance of the charge was in the present case in any way directly or indirectly communicated to the accused. The words "person charged" are to be found throughout this part of the Act, referring generally to the warrant which the accused may or may not have understood, or have been able to understand. If he could not understand our language, he would be treated just as he would be if on his trial, I suppose. I should think it could hardly be said that he could consent to be tried on a charge, after the magistrate had entered on the trial of that charge. He had not consented. According to the record before us it is alleged that the only consent given by the prisoner to be tried in a summary way was obtained without any statement of the charge having been made or read to him or in his presence. It was therefore clearly impossible for the prisoner, or for the magistrate, or for us, to say to what the consent was given.

I suppose the only logical mode of stating the situation is that the prisoner consented to be tried on any charge that the Crown desired to make, or might in the future make, against him on that occasion. That I think is entirely beyond the scope or meaning of the statute. After consent obtained under the section now being considered the magistrate is required to reduce the charge upon which the accused is to be tried to writing,

and to read the same to such person and ask him whether he is guilty or not guilty. What the record discloses is, that "the Crown adopting said charge the said Frederick McLeod was then arraigned before me on the said charge, and the same then in writing having been stated by me to the said Frederick McLeod, he pleaded to the said charge." Although the words "said charge" are used, there was nothing either written or stated in the prisoner's presence either before or after the alleged consent shewn upon the record.

It is clear from the record that neither the magistrate nor any one for him after the consent reduced any charge to writing, nor read any charge before the prisoner was asked to plead. There is nothing to shew what the Crown adopted, nor should it, I think, concern us to know. It would probably be important to know whether the magistrate "adopted" something in the writing and in that case it would be, I admit, well worth considering whether that might not have been regarded as a compliance with the distinct words of the Code that "the magistrate shall reduce the charge to writing," and I need not say whether something (which is indefinite) which the Crown adopted then being in writing could be stated by the magistrate to the accused or what this language means, but I am unable to see that this is a compliance with the Code in any sense whatever.

I am not indeed aware what view in respect to the want of compliance by the magistrate with the language of the Code raised on behalf of prisoner was taken by counsel for the Crown. I thought it significant after we heard the citation and discussion of authorities I have already referred to on behalf of the prisoner and offered to adjourn to hear counsel for the Crown, we were informed that they did not desire an adjournment and no reply was made.

I am of opinion that the prisoner is entitled to his discharge.

Discharge refused.

Note: *Summary trial—Cr. Code sec.* 785—*Revised Code* (1906) *sec.* 777.

See the following cases and annotations to same, *R.* v. *Bowers* (1903), 6 Can. Cr. Cas. 264; *R.* v. *Hayward* (1902), 6 Can. Cr. Cas. 399; and *Ex parte McDonald*, 9 Can. Cr. Cas. 368.

Before the revision of the Code (R.S.C., 1906, ch. 146), an appeal might be taken by way of reserved case or by special leave of the Court of Appeal, but upon questions of law only, from the decision of the police magistrate of a city or town trying a charge for an indictable offence by consent given under the Summary Trials Clauses and by virtue of the jurisdiction conferred by sec. 785 of the original Code now consolidated as sec. 777. If the magistrate had no authority under sec. 785 and his jurisdiction to try summarily depended upon sec. 783 (now 797) by reason of his being neither a police or stipendiary magistrate of a city or town nor a recorder, or, if in Ontario, not being a police or stipendiary magistrate at all, there was no appeal upon either the law or the facts, but the process of *certiorari* and *habeas corpus* might still be invoked. An amendment passed in 1895 providing for an appeal was so placed that its operation was restricted to cases where two justices of the peace acting together exercised the power of summary trial for some of the offences now enumerated in items (*a*) and (*f*) of revised section 773. In such cases an appeal should lie in the same manner as from summary convictions, 58-59 Vict. ch. 40, sec. 1. In the consolidation of 1906, this amendment of 1895 has been rearranged and is now found partly in revised sec. 771 (*a*7) and partly in revised sec. 797. The latter section now enacts that when any of the offences mentioned in paragraphs (*a*) or (*f*) of sec. 773 is tried in any of the provinces under the Summary Trials Part, an appeal shall lie from a conviction for the offence in the same manner as from summary convictions and all provisions of the Summary Convictions Part (XV.) relating to appeals shall apply to every such appeal; but providing by way of exception that no appeal shall lie in the Province of Saskatchewan or Alberta if the conviction is made by a Judge of a Superior Court. It will be seen that the wording of revised sec. 797 is wide enough to include an appeal from a city police magistrate trying a case under revised sec. 777 (formerly 785), notwithstanding which the right to a reserved case where sec. 777 is

Note: *Continued.*

Summary trial—Cr. Code sec. 785—Revised Code (1906) *sec. 777.*

the basis of jurisdiction, is still retained in revised sec. 1013. It would therefore appear that for the following offences, theft under $10, obtaining money or property under $10 by false pretences, receiving stolen property under $10, and keeping a disorderly house (where charged as an indictable offence) there will be the option of an appeal upon questions of law only to the Court of Appeal either by case reserved or by special leave, or of an appeal upon both law and fact as upon an appeal from a summary conviction, if the summary trial is conducted by a police or stipendiary magistrate under the powers of revised section 777.

[SUPREME COURT OF NEW BRUNSWICK.]

BEFORE TUCK, C.J. AND HANINGTON, LANDRY, BARKER AND McLEOD, JJ.

Ex parte McEWEN.

Summary conviction—Disqualification of justice—Relationship — Want of knowledge of—Failure to object at hearing—Cr. Code, secs. 839, 842—*Revised Code secs.* 705, 707.

1. A summary conviction made by two justices of the peace will not be quashed on the ground that one of them was related to the defendant, within the ninth degree of consanguinity, if the justice was not aware of the relationship, and no objection was taken at the hearing.

This, and three similar cases came before the Court on rules nisi to quash the convictions made for offences against the Canada Temperance Act by two justices of the peace. The rules were granted by Mr. Justice Hanington on the ground of the relationship of one of the convicting justices with the defendant. The affidavit of the defendant, on which the rules were granted,

stated that the mother of W. H. Biggar, one of the convicting justices, was an aunt of the defendant's mother.

McCully, now shewed cause.

No counsel appeared to support the rules.

FREDERICTON, January 31, 1906.

The judgment of the Court was now delivered by

HANINGTON, J.:—If this relationship existed it would bring the justice within the ninth degree of consanguinity, which, as the authorities state, would disqualify the justice if he was aware of the fact, but this rule is subject to that limitation. The test of the disqualification is, are the relationship and knowledge of the justice such as would reasonably create bias in the mind of the justice? This Court held in *Ex parte Wallace*, 27 N.B.R. 174, that a justice was disqualified from hearing a case against his daughter-in-law after the death of her husband, the death of the husband not having affected the relationship between the justice and his son's widow, and also in *Ex parte Jones*, 27 N.B.R. 552, the conviction was quashed where the grandfather of the justice was a brother of the defendant's great grandfather, following the common law principle that judicial officers should not act if related within the ninth degree of consanguinity. The reason usually given for this rule is that such relationship may reasonably create a bias in favour of the party with whom the relationship exists. Perhaps that is too limited a reason, and this Court has well decided in *Wetmore* v. *Levy*, 10 N.B.R. 180, that a relationship existing between the sheriff who empannelled the jury and the defendant is as effective an objection to the jury, at the instance of the defendant, as it would be if made by the party not related. The same principle applies to any person who is a necessary constituent of the Court.

No counsel appeared before us to support the rules. On the part of the prosecution it is shewn by affidavit that no objection was made at the trial that any such, or in fact any relationship existed, and further that the justice was, and yet is entirely un-

aware of any relationship with the defendant, and the defendant's affidavit does not state that he or the justice knew at the time of the trial that any relationship existed. Under these circumstances we think the justice could not possibly have been in any way biased, nor could the relationship, even if it existed, have had any effect whatever upon the adjudication. The offence was clearly proved, and, under the facts as they are before us, no bias or inference of bias could exist. The convictions will stand.

Rules discharged.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE FALCONBRIDGE, C. J. K. B., AND BRITTON AND MABEE JJ.
SITTING AS A DIVISIONAL COURT.

THE KING v. SPELLMAN.

Jurisdiction of magistrate—County police magistrate—Subsequent appointment of another with same territorial jurisdiction—First appointment not superseded unless so expressed—Jurisdiction of city magistrate in county under provincial statute—R. S. O. (1897) *ch.* 87, *secs.* 15, 18.

1. The appointment of a county police magistrate does not necessarily supersede a like previous appointment of another person, but both will have jurisdiction unless the latter appointment is expressed to be in the place and stead of the former.

ARGUED : October 26, 1906.
DECIDED : November 30, 1906.

THIS was a motion to quash a conviction for selling liquor without a license, which was argued in the first instance as if on the return of a rule *nisi* with the consent of the Deputy Attorney-General, who appeared in support of the conviction, and by the permission of the Court.

The offence was committed in the village of Lakefield within the county of Peterborough, but outside the limits of the city of Peterborough.

It appeared that the convicting police magistrate, Mr. D. W. Dumble, had on the 25th of November, 1882, been appointed police magistrate for the town of Peterborough under R.S.O. 1877, ch. 72; and that the town was afterward incorporated as the city of Peterborough: Mr. Dumble held the office of police magistrate of the city, and on the 22nd of April, 1886, was appointed police magistrate for the county of Peterborough under 41 Vict. ch. 4, sec. 9 (O.); that Mr. George Edmison was afterwards, on the 30th of July, 1889, appointed a salaried police magistrate for the county of Peterborough under 48 Vict. ch. 17, sec. 1 (O.), and R.S.O. 1887, ch. 72, sec. 8; and that when Mr. Dumble heard the evidence and made the conviction against the defendant he was not acting because of the illness or absence, or at the request of Mr. Edmison.

TORONTO, October 26, 1906.

Haverson, K.C., for the motion, contended that the appointment of Mr. Edmison as police magistrate for the county superseded the appointment of Mr. Dumble as police magistrate for the county, and that the latter had no jurisdiction to hear the complaint and try the offence committed outside of the city of Peterborough unless because of the illness or absence or at the request of Mr. Edmison, and cited *Rex* v. *Miller* (1906), tried before Anglin, J. (not reported); *Robertson* v. *Freeman* (1863), 22 U.C.R. 298; *Smyth* v. *Latham* (1833), 9 Bing. 692, at p. 710.

John R. Cartwright, K.C., shewed cause, and contended that the later appointment not being made "in the place and stead" of the former, did not interfere with or affect in any way the jurisdiction of the one first appointed, and that Mr. Dumble, being *ex officio* a justice of the peace for the county, as police magistrate could, sitting alone, do everything that two justices of the peace

could do in the county, and cited *Hunt qui tam* v. *Shaver* (1895), 22 A.R. 202.

TORONTO, November 30, 1906.

FALCONBRIDGE, C.J.:—The power to appoint a police magistrate under 41 Vict. ch. 4, sec. 9 (R.S.O. 1897, ch. 87, sec. 18), lies with the Lieutenant-Governor-in-Council; but the appointment under R.S.O. 1887, ch. 72, sec. 8 (now R.S.O. 1897, ch. 87, sec. 15), is to be made by the Lieutenant-Governor.

The Interpretation Act, R.S.O. 1887 & 1897, ch. 1, secs. 6 & 7, defines what is meant by the words "Lieutenant-Governor" and "Lieutenant-Governor-in-Council."

In *Smyth* v. *Latham*, 9 Bing. 692, the appointing power was the same, viz., the Commissioners or the Treasury, and it appears (p. 710) that the new officer was appointed "in the place and stead" of the old one.

In *Robertson* v. *Freeman*, 22 U.C.R. 298, the appointing power was the same, and there could, of course, be but one county attorney for the county.

The appointment therefore of Mr. Edmison is not a revocation of that of Mr. Dumble.

And *Hunt qui tam* v. *Shaver*, 22 A.R. 202, declares that when Mr. Dumble acts, he acts not strictly as a justice of the peace, but as a police magistrate.

I think that Mr. Dumble had jurisdiction, and that the conviction ought to be affirmed, without costs.

BRITTON, J.:—On the 31st August, 1906, at the city of Peterborough, the defendant Spellman was convicted by Mr. D. W. Dumble as police magistrate for the city of Peterborough and for the county of Peterborough of selling intoxicating liquor at Lakefield, in said county, without having the license to sell. Spellman was fined $100.

The objection strongly pressed by counsel for defendant was that Mr. Dumble had no jurisdiction to try the accused for the offence,

because (*a*) he is not police magistrate for the county, and (*b*) that as police magistrate for the city he had no jurisdiction to try an offence committed in the county outside of the city, there being a police magistrate for the county and in this instance, Mr. Dumble was not acting because of the illness or absence or at the request of that county police magistrate.

Mr. Dumble was appointed a police magistrate for the then town of Peterborough on the 25th November, 1882. He still holds the office for the city of Peterborough—that is conceded. His appointment as police magistrate for the town was authorized by ch. 72, R.S.O. 1877. 41 Vict. ch. 4, sec. 9 (1878), authorized the appointment of a police magistrate for a county, etc., and on the 22nd April, 1886, Mr. Dumble was appointed a police magistrate for the county of Peterborough.

This sec. 9 was carried into the R.S.O. 1887, as sec. 9 of ch. 72.

In 1885, by ch. 17, sec. 1, 48 Vict. (O.), provision was made for the appointment of a salaried police magistrate for the county after the passing of a resolution by the county council affirming the expediency of such appointment. This authority is continued by R.S.O. 1887, ch. 72, sec. 8, and by R.S.O. 1897, ch. 87, sec. 15.

Mr. George Edmison was appointed a police magistrate for the county of Peterborough on the 30th July, 1889, ch. 72, sec. 8, R.S.O. 1887.

I agree with the learned Chief Justice that the appointment of Mr. George Edmison cannot under the circumstances be considered to be in any way "in the place and stead" of Mr. Dumble, and so Mr. Dumble's appointment for the county is not revoked.

But further, I agree with the argument for the Crown that Mr. Dumble as police magistrate for the city acting as he did, and adjudicating in the present case, was within his jurisdiction.

The powers given to the police magistrate for a town or city R.S.O. 1877, ch. 72, secs. 4 & 7, are continued by R.S.O. 1897, ch. 87, secs. 27 & 30.

By sec. 27 Mr. Dumble is *ex officio* a justice of the peace for the whole county of Peterborough.

By sec. 30, sitting as a police magistrate he has power to do

alone whatever is authorized by any statute in force in Ontario, within the legislative authority of the Province to be done by two or more justices of the peace—and he has that power while acting anywhere within the county for which he is *ex officio* a justice of the peace.

My opinion is confirmed by sec. 35: "No police magistrate need act in any case arising outside of the limits of the city, town or place for which he is police magistrate unless he sees fit to do so."

The inference is that a police magistrate for the town or city has jurisdiction in the county and outside of what may be called his limits if he chooses to exercise it, although he is not bound to do so. Section 17 does not, I think, restrict the action of a police magistrate. Section 20 is restrictive, but only to police magistrates appointed for a county or district or part of a county or district. *Hunt* v. *Shaver*, 22 A.R. 202, emphasizes the distinction created by statute between a police magistrate when acting either as such or as *ex officio* justice of the peace.

The conviction should be affirmed without costs.

MABEE, J., concurred in the judgment of the Chief Justice.

Conviction affirmed.

[COURT OF APPEAL FOR ONTARIO.]

BEFORE MOSS, C.J.O., AND OSLER, GARROW, MACLAREN, AND MEREDITH, JJ.A.

THE KING v. BURR.

Seduction of girl under 16—Corroboration—Statements antecedent to the offence—Admissions subsequent to offence—Ruling in favor of accused as to corroboration—Reversal on appeal by Crown—Order for new trial—Discretion of appellate court—Cr. Code (1892), *secs.* 181, 684, 746—*Revised Code* (1906), *secs.* 211, 1002, 1018.

1. Evidence that the accused charged with seduction of a girl between 14 and 16 (Revised Code, sec. 211) had previously told a witness other than the girl of his desire to have sexual intercourse with her, and of subse-

quent admissions of the accused from which it might be inferred that he had afterwards taken advantage of an opportunity when he was left in charge of the house where the girl lived, is corroborative evidence to go to the jury under sec. 1002 of the Revised Code (former sec. 684), although no medical evidence is adduced in support of the girl's story.

2. Upon an appeal by the Crown, by leave of the Court of Appeal, from the judgment acquitting the accused and withdrawing the case from the jury on the ground that there was no corroborative evidence under Revised Code, sec. 1002, the Court of Appeal, on revising such ruling, should direct a new trial.

3. Sec. 1018 of the Revised Code (former sec. 746) is permissive and not obligatory as to the granting of a new trial upon reversing a judgment of acquittal, and the Appellate Court has a discretion to grant or refuse a new trial, or to make such other order as justice requires.

ARGUED: November 16, 1906.
DECIDED: December 1, 1906.

CASE stated by the acting chairman of the general sessions of the peace for the county of Kent, pursuant to the direction of this Court; under sec. 743 of the Criminal Code, 55-56 Vict. ch. 29 (D.)

The accused was placed on trial at the sittings of the general sessions of the peace for Kent in June, 1906, at which the junior Judge of the county was presiding as chairman.

The indictment charged that the accused seduced and had illicit intercourse with a girl of previously chaste character above the age of 14 years and under the age of 16 years, not being his wife.

The girl testified to acts of illicit intercourse between her and the accused, and other witnesses were examined for the purpose of corroborating her testimony.

At the conclusion of the evidence for the Crown the learned chairman ruled that there was not the corroboration required by sec. 684 of the Criminal Code, and he withdrew the case from the jury and directed the accused to be discharged.

The question submitted was whether the ruling was right.

TORONTO, November 12, 1906.

J. R. Cartwright, K.C., for the Crown, contended that the evidence was stronger than in *Rex* v. *Daun* (1906), 11 Can.

Crim. Cas. 244, 12 O.L.R. 227, and should have gone to the jury; that there was sufficient corroboration within the meaning of the Criminal Code, which only requires that there shall be some evidence to strengthen that of the principal witness; and that anything which goes to shew that the story told is, as regards the accused, probable, should suffice: *Radford* v. *Macdonald* (1891), 18 A.R. 167; *Harvey* v. *Anning* (1903), 67 J.P. 73.

O. L. Lewis, for the prisoner, contended that in all the cases cited there was evidence of pregnancy; that here no medical testimony was adduced; and no evidence of any one, except the girl herself, of any disturbance of physical condition; that it was for the Judge to say whether there was corroborative evidence; that statements made before the act charged were not sufficient; that the decision in *Rex* v. *Daun*, *supra*, was based largely on *Parker* v. *Parker* (1881), 32 C.P. 113, but that was a decision under a statute in which the language was much wider than that in question here, as was also the case with the Evidence Act, 32 and 33 Vict. ch. 19, sec. 54 (Can.) and the Bastardy Act; and that evidence consistent with either of two views cannot be called corroborative: *In re Finch*, *Finch* v. *Finch* (1883), 23 Ch. D 267. He also referred to *Reg.* v. *McBride* (1895), 26 O R. 639, 2 Can. C.C. 544; *Reg.* v. *Giles* (1856), 6 C.P. 84; *Rex* v. *Burns* (1901), 1 O.L.R. 336, at p. 339; Wills on Circumstantial Evidence, 5th ed., at pp. 239, 262; *ibid.* American notes, p. 272, F.; Phipson on Evidence, 3rd ed., p. 455; Canadian Criminal Cases, vol. 2, p. 261; Snow's Annotated Criminal Code, p. 368.

Cartwright, in reply, contended that the question really was whether there being conflicting evidence the case should not have gone to the jury.

TORONTO, December 1, 1906.

Moss, C.J.O. [after stating the facts as above]:—Under sec. 684 a person accused of an offence of the nature charged in this case is not to be convicted upon the evidence of one witness

unless such witness is corroborated in some material particular by evidence implicating the accused.

This does not necessarily make it incumbent upon the Crown to adduce testimony of another or other witnesses to the acts charged. To do so would be to virtually render a conviction impossible in the majority of cases like the present.

It is enough if the e be other testimony to facts from which the jury, or other tribunal trying the case, weighing them in connection with the testimony of the one witness, may reasonably conclude that the accused committed the act with which he is charged.

In this case it was shewn that the accused was seen taking improper liberties with the girl on more than one occasion, and that he had on at least two occasions expressed a strong desire for sexual intercourse with her.

And there was also given in evidence a statement made by him after the alleged offence from which it might not unreasonably be inferred that he had availed himself of the opportunity afforded him through the absence from home for some days of the girl's parents, during which time he was in charge of the house where the girl and her young brothers and sister were.

These matters were material to the charge, and pointed to the accused as the perpetrator of the offence, and they should not have been withdrawn from the jury.

The answer to the question, therefore, should be in the negative, and under all the circumstances of the case a new trial should be directed.

It may, however, be pointed out that sec. 746 of the Code does not make it obligatory on the Court to direct a new trial in every case which comes before it under the jurisdiction conferred by the Code.

The language of the section is permissive, and the Court, in addition to the other powers conferred upon it, is enabled to make such other order as justice requires.

The matter is left to the Court to exercise its discretion in each case as the circumstances seem to require.

It follows that there can be no general rule, and the Court ought

not to attempt to lay down, in any one case, the considerations which should govern in another. The considerations influencing the exercise of discretion in one class of cases may differ materially from those affecting it in another class. Especially may this be so in cases where the accused has been discharged and the Crown is appealing. There the considerations that would govern where the accused was convicted and was the appellant, would not necessarily be applicable: *Rex* v. *Karn* (1903), 5 O.L.R. 704, 6 Can. Crim. Cas. 479.

Having regard to the nature of the offence and the circumstances under which it has been sworn it was committed, the present case is one in which the discretion should be exercised in such manner as to afford the Crown an opportunity of once more putting the law in motion against the accused if it thinks fit to do so.

GARROW and MACLAREN, JJ.A., concurred.

OSLER, J.A.:—I agree that there was evidence which ought not to have been withdrawn from the jury corroborating in some material particular the evidence of the prosecutrix implicating the accused.

I should, however, have been better satisfied if the Court in its discretion had thought fit not to direct a new trial, seeing that the Crown did not press for it and that, as stated in the argument, the prisoner had left the country. To place a prisoner who has been acquitted a second time upon his trial, even where his acquittal has resulted from some erroneous ruling by the trial Judge, is a course which in my judgment should very rarely be adopted. It does not follow, and the Criminal Code has not said so, that because the trial Judge has been found to have gone wrong there must be a new trial. A very wide discretion has been entrusted to the Court on an appeal of this nature, *i.e.*, an appeal by way of a case stated, which is one of those provided for by sec. 742 of the Code. A new trial may be directed, or such other order made as justice requires. Clearly it is the duty of the Court to consider all the circumstances of the case, among which are its importance to

the public, the magnitude of the offence, the fact that the accused has already undergone a trial, and whether, having regard to the evidence, anything seems likely to be gained by a further trial of the case. In most cases of the kind the ends of justice would be fully satisfied by a decision upon the point of law which would be a guide for the future.

I have more than once pointed out that it is not for the Judge who states the case to say what is to be the result of the opinion of the Court of Appeal on the questions stated. That is left to the Appellate Court in whom the Act reposes a very wide discretion.

MEREDITH, J.A.:—Unless the case of *King* v. *Daun* (1906), 11 Can. Crim. Cas. 244, 12 O.L.R. 227, and the cases referred to in it, were wrongly decided, this was a case for the jury. There is no good reason for thinking they were. If they are inconsistent with the case of *Reg.* v. *Vahey* (1899), 2 Can. C.C. 258, they should prevail.

It is true that there is not in this case that indisputable evidence of sexual intercourse which existed in the other cases, but there are several circumstances of corroboration, two of which only need be referred to. The accused's statement to one of the witnesses is open to the inference that he had the desire to do that which he is charged with having done, and would have paid $10 to have that desire gratified; and his admission to another witness is open to the inference that he had the opportunity, and that the girl's parents were to blame for that and for his taking advantage of it. It is for the jury to say whether this statement, and this admission, were really made, and, if so, what they meant. If they find that they were made, and that they meant that which I have mentioned, they are something more than corroboration. There is no difficulty in the Court explaining to the jury the effect of their findings on the question of corroboration, when that is necessary, nor in their acting accordingly; that is necessary in almost every case, for the jury may not find, or believe, any corroborative evidence, and must be charged that they cannot find the accused guilty on the

testimony of the accuser only. This case was plainly, I think, one for the jury.

The learned chairman of the sessions has rightly stated what the effect of this conclusion should be. There ought to be a new trial. That logically follows; that can be the only proper object of the reserved case; and should be the general rule. There may be cases in which it might not be proper to make such an order; but there is not anything of an exceptional character in this case; and unless there is to be a general rule that a new trial will not be granted, and the purpose of the enactment is to be thereby frustrated, and cases of this sort turned into academic discussions, there must be a direction for a new trial. It was never intended that this Court should impede a proper trial of an accused person, should usurp the power of the Crown to do that which would be equivalent to entering a *nol. pros.*, or the power of a jury to acquit—and that without a proper trial—such a person. Our conservative notions of the old rule, that no one should be twice put in jeopardy for the one offence, must not lead us to practically repeal the enactment which has broken the rule down.

Order for new trial.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE GRAHAM, E.J., IN CHAMBERS.

THE KING v. YOUNG.

Disorderly house—Being inmate of bawdy-house—Vagrancy—Form of conviction—Summary trial or Summary conviction—Commitment—Fixed term "or until delivered by due course of law"—Revised Criminal Code (1906) *secs.* 238, 239, 773, 774.

1. A conviction by a city stipendiary magistrate for the offence of being an inmate of a bawdy-house need not expressly state on its face that the accused is a vagrant.

2. A warrant of commitment following a conviction by a magistrate whereby three months' imprisonment was imposed, is not invalid because it directs detention "for three months or until delivered by due course of law."
3. The addition of the words "or until delivered in due course of law" is in such case a contingent limitation upon the three months' term which would apply upon the quashing of the conviction or other like contingency.

Motion on notice to the prosecutor and convicting justice for the discharge of the defendant on the return of a habeas corpus. The facts of the case are stated in the judgment.

HALIFAX, N.S., October 26, 1906.

J. B. Kenny, for the prisoner.
No one contra.

HALIFAX, N.S., November 2, 1906.

GRAHAM, E.J.:—Effie Maud Young has been convicted before a stipendiary magistrate for the city of Sydney "for that she on or about the 24th day of September, 1906, in the city of Sydney, was unlawfully an inmate of a disorderly house, to wit a common bawdy house or house for the resort of prostitutes."

By the warrant of commitment she was committed to the goal for the "term of three months or until she shall be therein delivered by due course of law."

Sections 207 and 208 are in effect as follows:—

"Everyone is a loose, idle or disorderly person or vagrant who" (then follows a number of acts very different in character).

"(*j*) is a keeper or an inmate of a disorderly house, bawdy house or house of ill fame or house for the resort of prostitutes."

Then comes the penalty:—

"Every loose, idle or disorderly person or vagrant is liable on summary conviction to a fine—or to imprisonment for any term not exceeding six months or to both."

It is contended that instead of stating in the conviction the specific act of vagrancy under (*j*) as was done in this case it should have been stated in the conviction that she was "a loose, idle or disorderly person or vagrant."

As is pointed out in the case quoted from, the manner suggested by the defendant's counsel would not be fair to the defendant. Those words might cover a charge for an offence of wilfully refusing to maintain herself or of tearing down door plates or of being a common prostitute. The mode adopted has the advantage of certainty. It also has the advantage of giving fair notice to a defendant of the charge against her.

I am of the opinion that the paragraph (*j*) with its context constitutes an offence and that this conviction properly states a charge under it, using the generic term which is applied to cover all the various acts from (*a*) to (*l*), *i.e.*, the name which for convenience is given to a person committing any of those acts.

The King v. *Keeping*, 4 Can. Crim. Cas. 497, is cited in which the conviction stated that the defendant "was the keeper of a disorderly house, that is to say, a common bawdy house at No. 18, etc." The judgment discharging the defendant contains these words: "Sec. 207(*j*) of the Code does not help the matter as that sub-section creates no offence but only indicates one of the many ways how a person may be a 'loose, idle or disorderly person or vagrant,' and that is the proper way to charge an offence under that section."

I think that the contention is at variance with the case of *The King* v. *McCormack*, 7 Can. Crim. Cas. 135, in which it was held, by Hunter, C.J., "that a summary conviction for being a loose, idle person or a vagrant without specifying in what the vagrancy consisted under Code sec. 207 is void for uncertainty."

Hunter, C.J., there said:—"The conviction is clearly bad. You might as well charge a man generally with being a thief. The

accused was entitled to know under what sub-section of sec. 207 he was charged, that is, what the facts were on which the prosecution relied."

I refer also to the remarks of Lord Alverstone, C.J., in *Smith* v. *Moody*, [1903] 1 K.B. 56; also to the forms under the English Vagrancy Act, 5 Burn's Justice of the Peace 1051; Stone's Justices' Manual, Appendix, 1138; in which the specific act constituting the person a loose, idle or disorderly person is set forth.

It is also contended that the words in the conviction "or until she be therein delivered by due course of law" vitiates it. But I think those words are to be read as a limitation on the provision fixing the term of three months. An unnecessary provision has been inserted for the case of an appeal and security being given or a quashing of the conviction before the three months' term has expired or some such contingency.

Those words have been held to vitiate a conviction where no term of imprisonment has been fixed, but here they seem to be unobjectionable.

The application to discharge the defendant will be dismissed.

Application refused.

COMPARATIVE TABLE

SHEWING THE REARRANGEMENT OF SECTION NUMBERS ON THE REVISION OF THE CRIMINAL CODE (1906).

Section of Criminal Code (1892).	Corresponding Section in Revised Criminal Code (1906).	Section of Criminal Code (1892).	Corresponding Section in Revised Criminal Code (1906).	Section of Criminal Code (1892).	Corresponding Section in Revised Criminal Code (1906).
1	1	43	51	82	90
3	2, 3, 4, 5	44	52	83	91, 92
4	6	45	53	84	93
5	589	46	54	85	96
7	16	47	55	86	97
9	17	48	56	87	98
10	18	49	57	88	99
11	19	50	58	89	102, 103
12	20	51	59	90	100
13	21	52	60	91	101
14	22	53	61	92	2
15	23	54	62	93	104
16	24	55	63	94	105
17	25	56	64	95	106
18	26	57	65	96	107
19	27	58	66	97	108
20	28	59	67	98	109
21	29	60	68	99	111
22	30	61	69	100	113
23	31	62	70	101	114
24	32	63	71	102	115
25	33	64	72	103	116
26	34	65	74	104	117
27	35	66	75	105	118, 1135
28	36	67	76	106	119
29	37	68	77	107	120
30	38	69	78	108	121
31	39	70	79	109	122
32	40	71	80	110	123
33	41	72	81	111	124
34	42	73	82	112	125
35	43	74	83	113	126
36	44	75	84	114	127
37	45	76	73	115	128
38	46	77	85	116	[To Territories Act, R.S.C., c. 62, secs. 2, 104]
39	47	78	86		
40	48	79	87		
41	49	80	88		
42	50	81	89		

COMPARATIVE TABLE.—*Continued.*

Section of Criminal Code (1892).	Corresponding Section in Revised Criminal Code (1906).	Section of Criminal Code (1892).	Corresponding Section in Revised Criminal Code (1906).	Section of Criminal Code (1892).	Corresponding Section in Revised Criminal Code (1906).
				213	247
117	146, 147	163	189	214	248
118	150, 151, 152	164	190	215	244
119	141	165	191	216	240, 245
120	129	166	192	217	249
121	130	167	194	218	250
122	131	168	195	219	251
123	132, 133	169	196	220	252
124	134	170	198	221	253
125	135	171	199	222	254
126	136	172	200	223	255
127	137	173	201	224	256
128	138	174	202	225	257
129	139	175	203	226	258
130	140	176	204	227	259
131	156	177	205	228	260
132	157	178	206	229	261
133	155, 158	181	211	230	262
134	159	182	212	231	263
135	160	184	214	232	264
136	161	185	216	233	265
137	162, 163, 165	186	215	234	266
138	164	188	218	235	267
139	165	190	220	236	268
140	94	191	221	237	269
141	95	192	222	238	270
142	167	193	223	239	271
143	166	194	224	240	272
144	168, 169	195	225	241	273
145	170, 171	196	226	242	274
146	174	197	227	243	275
147	175	198	228	244	276
148	172	199	229	245	277
149	173	200	230	246	278
150	176	201	231, 232	247	279
151	177	202	233	248	280
152	178	203	234	249	281
153	179	204	235	250	282
154	180	205, ss. 1, 2,		251	283
155	181	3, 4, 5	236	252	284
156	182	206	237	253	285
157	183	207	238	254	286
158	184	208	239	255	287
159	185	209	241	256	288
160	186	210	242	257	289
161	187	211	243	258	290
162	188	212	246	259	292

COMPARATIVE TABLE.—*Continued.*

Section of Criminal Code (1892).	Corresponding Section in Revised Criminal Code (1906).	Section of Criminal Code (1892).	Corresponding Section in Revised Criminal Code (1906).	Section of Criminal Code (1892).	Corresponding Section in Revised Criminal Code (1906).
260	293	310	357	357	387
261	294	311	352	358	404
262	295	312	353	359	405
263	296	313	354	360	406
265	291	314	399	361	407
266	7, 298	315	400	362	412
267	299	316	401	363	390
268	300	317	402	364	413
269	301	318	403	365	414
270	302	319	359	366	415
271	306	320	358	367	416
272	303	321	391	368	417
273	304	322	360	369	418
274	305	323	361	370	419
275	240, 307	324	362	371	420
276	308	325	363	372	421
277	309	326	364	373	422
279	311	327	365	374	423
280	312	328	366	375	424
281	313	329	367	376	425
282	314	330	368	377	426
283	315	331	369	378	427
285, ss. 2	317	333	393	379	428
286	318	334	371	380	429
287	319	335	372	381	430
288	320	336	373	382	431
289	321	337	374	383	2, 335
290	322	338	394	384	432
291	323	339	377	385	433
292	324	340	395	386	434
293	325	341	375	387	435
294	326	342	376	388	436
295	327	343	378	389	437
296	328	344	379	390	438
297	329	345	380	391	439
298	330	346	381	392	440, 335
299	331	347	388	393	441
300	332	348	389	394	444
301	333	349	382	395	442
302	334	350	383	396	443
303	344	351	384	397	445
304	345, 346	353	385	398	446
305	347, 348	352	396	399	447
307	350	354	397	400	448
308	355	355	398	401	449
309	356	356	386	402	450

COMPARATIVE TABLE.—*Continued.*

Section of Criminal Code (1892).	Corresponding Section in Revised Criminal Code (1906).	Section of Criminal Code (1892).	Corresponding Section in Revised Criminal Code (1906).	Section of Criminal Code (1892).	Corresponding Section in Revised Criminal Code (1906)
403	451	451	492	498	520
404	452	452	493	499	510
405	453	453	494	500	536
406	454	454	495	501	537
407	335, 339, 340	455	342	502	538
408	455	456	408	503	528
409	456	457	409	504	529
411	458	458	410	505	531
412	459	459	411	506	532
413	460	460	2, 546, 547	507	530
414	461	461	548	508	533
415	462	462	552	509	534
416	463	463	553	510	535
417	464	464	554	511	539, 540
418	465	465	555	512 (*b*), (*c*)	542
419	335	466	556	513	543
420	2, 335	467	557	514	544
421	335, 338	468	558	515	545
422	466	469	559	516	496
423	468, 469, 470	470	560	517	497
424	467	471	561	518	590
425	472	472	562	519	2, 335
426	473	473	563	521	499
427	474	474	564	522	500
428	475	475	565	523	501
429	476	476	566	524	502
430	550	477	567	525	503
431	477	478	568	526	504
432	478	480	569	527	573
433	335	481	509, 541	528	570
434	471	482	511	529	571
435	479	483	512	530	572
436	480	484	513	531	574
437	481	485	514	532	575
438	482	486	515	533	576
439	483	487	516	534	13
440	484	488	112	535	14
441	485	489	517	536	[To Interpretation
442	551	490	518		Act, sec.
443	335, 337, 341	491	519		28]
444	335, 336	492	521		
445	486	493	522	537	[To Interpretation
446	487	494	523		Act, sec,
447	488	495	526		29]
448	489	496	524		
450	491	497	525	538	580

COMPARATIVE TABLE.—*Continued.*

Section of Criminal Code (1892).	Corresponding Section in Revised Criminal Code (1906).	Section of Criminal Code (1892).	Corresponding Section in Revised Criminal Code (1906).	Section of Criminal Code (1892).	Corresponding Section in Revised Criminal Code (1906).
539	582	583	675	627	849
540	583	584	676, 677	628	851
541	604, 1152	585	678	629	898
542	591	586	679	630	901
543	592	587	681	631	905, 906, 907
544	593	588	680	632	908
545	594	590	682, 683	633	909
547	596	591	684	634	910, 911
548	597	592	685	635	916
549	598	593	686	636	917
551	1140	594	687	637	918
552	646, 651, 652	595	688, 689	638	919
553	584	596	690	639	920
554	653	597	691	640	577, 888
555, ss. 1, 2	585	598	692, 693, 1100	642	940
555, ss. 3	[To Prisons Act, sec. 36]	599	694	643	874
		600	695	644	875
556	588	601	696	645	876
557	665, 666	602	698	646	877
558	654	603	699	647	878
559	655	604	700, 701	648	879, 880, 881, 882
560	656	605	702	649	[To Prisons Act. secs, 4, 5]
561	657	606	703		
562	658	607	704		
563	659, 660	608	843	650	883
564	661	609	844	651	884, 885, 886
565	662	610	845	652	941
566	663	611	852, 853	653	894
567	664	612	854, 892	654	895
568	667	613	855, 859	655	896
569	629, 630, 631 632, 663, 634, 635	614	847	656	899
		615	859, 861	657	900
		616	855, 859, 862, 863	658	897
570	636			659	942
571	637	617	860	660	943
572	638	618	846	661	944
573	639	619	864	662	921
574	640	620	865	663	922
576	643	621	866, 893	664	923
577	668	622	867	665	924
578	669	623	868	666	925, 926
579	670	624	869, 850	667	927, 928, 929
580	671	625	848	668	930, 931, 932, 933, 935, 936
581	672	626	856, 857, 858, 1005		
582	673, 674				

COMPARATIVE TABLE.—*Continued.*

Section of Criminal Code (1892).	Corresponding Section in Revised Criminal Code (1906).	Section of Criminal Code (1892).	Corresponding Section in Revised Criminal Code (1906).	Section of Criminal Code (1892).	Corresponding Section in Revised Criminal Code (1906).
669	934	711	949	754	599
670	937	712	950	755	600
671	938	713	951	756	601
672	939	714	952	757	902
674	946	715	954	758	903
675	965	716	993	759	904
676	963, 964	717	994	761	603
677	971	718	955	762	822
678	972	719	956	763	823
679	974, 975	720	[To Evidence	764	824
681	995		Act, sec.	766	826
682	996		33]	768	829
683, ss. 1	997	721	957	769	830
684	1002	722	958	770	831
685	1003	723	889, 890	771	832
686	998	724	891	772	833
688	1000	725	915	773	834
689	1001	726	914	774	835
690	978	727	959	775	836
691	979	728	960	776	837
692	980	730	1008	777	838
693	981	731	1009	778	839
694	982	732	962	779	840
695	[To Evidence	733	1004, 1006,	780	841
	Act, sec.		1007	781	842
	12]	734	1010	782	771
696	[To Evidence	735	1011	783	773
	Act, sec.	736	966	784, ss. 1, 2	774, 775
	32]	737	967	786	778
697	983	739	968	787	780
698	[To Evidence	740	969	788	781
	Act, sec. 8]	741	970	791	784
699	[To Evidence	742	1013	792	785
	Act, sec. 9]	743	1014	793	786
700	[To Evidence	744, ss. 3,		794	787
	Act, sec.	4, 5	1016	795	788
	10]	745	1017	796	789
701	[To Evi-	746	1018, 1019,	797	790
	dence Act,		1020	798	791
	sec. 11]	747	1021	799	792
704	987	748	1022	800	1130
706	948	749	1023	802	794
707	988	750	1024	803	795
708	990	751	1025	804	796
709	991	752	1120	805	1097
710	992, 488	753	579	807	799

COMPARATIVE TABLE.—*Continued.*

Section of Criminal Code (1892).	Corresponding Section in Revised Criminal Code (1906).	Section of Criminal Code (1892).	Corresponding Section in Revised Criminal Code (1906).	Section of Criminal Code (1891).	Corresponding Section in Revised Criminal Code (1906).
808	798, 772	859	727	900, ss. 9	766
809	800	860	728	900, ss. 10	767
810	802	861	729	900, ss. 11	767
811	805	862	730	900, ss. 12	768
812	806	863	731	900, ss. 13	1097
813	807	865	733	900, ss. 14	1151
814	808	866	734	900, ss. 15	769
815	809	867	735	901	747
816	810	868	736	902	1133, 1234
817	811	869	737	903	1137
818	812	870	738	904	1150
819	813	871	770	905	1134
820	814, 1123	872	739, 740, 741	906	1138
821	815	873	742	907	725
822	816	874	743	908	607
823	1139	875	744	909	608
824	817	876	745	910	1088
825	818	877	746	911	1089
826	819	878, ss. 1	1097	912	1090
828	820, 821	879	749	913	1091
829	801	880	750, 751	914	1092
830	803	881	752	915	1093
831	804	882	753	916	1102, 1103, 1104, 1105, 1106
833	1045	883	754		
834	1046	884	755		
835	1047	885	756	917	1094
836	1048	886	1121	918	1095
837	1049	887	1122	919	1108
838	1050	888	757	920	1107
839	2, 705	889	1124	921	1109
840	706	890	1125	922	1110
841	1142	891	1131	923	1111
842	707, 708, 709	892	1126	924	1112
843	711	893	1096	925	1101
844	712	894	1128	926, ss. 1	1087
845	710	895	1127	926, ss. 2	1113, 1114 1115, 1116
847	724	896	1129		
848	713	897	758	926, ss. 3	1119
849	714	898	759	926, ss. 4	1086
850	715	899	760	926, ss. 5	1118
851	716	900, ss. 1	705	928	1037
852	717	900, ss. 2	761	929	1038
853	718	900, ss. 3	761	930	1141
854	719	900, ss. 4	762	931	1027
855	720	900, ss. 5	763	932	1028
856	721	900, ss. 6	764	933	15
857	722	900, ss. 7	765	934	1029
858	726	900, ss. 8	766	935	1061

COMPARATIVE TABLE.—*Continued.*

Section of Criminal Code (1892).	Corresponding Section in Revised Criminal Code (1906).	Section of Criminal Code (1892).	Corresponding Section in Revised Criminal Code (1906).	Section of Criminal Code (1892).	Corresponding Section in Revised Criminal Code (1906).
936	1062	959	748	Form DD	Form 30
937	1063	960	1059	" EE	" 63
938	1064	961	1034	" FF	" 64
939	1065	962	1030	" GG	" 65
940	1066	963	1031	" HH	" 66
941	1067	964	1032	" II	" 67
942	1068	965	1033	" JJ	" 68
944	1070	966	1076	" KK	" 69
945	1071	967	1077	" LL	" 70
946	1072	968	1078	" MM	" 60
947	1073	969	1079	" NN	" 61
948	1074	970	1080	" OO	" 62
949	1075	972	1082	" PP	" 13
950	1051	973	1083	" QQ	" 55
951	1052	974	1026	" RR	" 56
952	1053	975	1143	" SS	" 57
953	1054	976	1144	" TT	" 58
954	1055	977	1145	" UU	" 59
955	[To Penitentiary Act, sec. 42]*	978	1146	" VV	" 31
		979	1147	" WW	" 32
		980	1148	" XX	" 33
955, ss. 2	[To Militia Act, sec. 137]	982	1152	" YY	" 34
		983	8, 9	" ZZ	" 35
		Schedule 1		" AAA	" 36
955, ss. 3	1056	Form A	Form 9	" BBB	" 37
955, ss. 4	[To Militia Act, sec. 137]	" B	" 10	" CCC	" 38
		" C	" 3	" DDD	" 39
		" D	" 4	" EEE	" 40
955, ss. 5	[To Penitentiary Act, sec. 62]	" E	" 5	" FFF	" 41
		" F	" 6	" GGG	" 42
		" G	" 7	" HHH	" 47
	[To Prisons Act, sec. 12]	" H	" 8	" III	" 43
		" I	" 2	" JJJ	" 44
		" K	" 11	" KKK	" 45
955, ss. 6	[To Penitentiary Act, sec. 50]	" L	" 12	" LLL	" 46
		" M	" 14	" MMM	" 73
		" N	" 15	" OOO	" 51
	1057	" O	" 16	" PPP	" 52
955, ss. 7	[To Penitentiary Act, sec. 43, ss. 2]	" P	" 17	" QQQ	" 53
		" Q	" 18	" RRR	" 54
		" R	" 73	" SSS	" 75
		" S	" 19	" TTT	" 74
	[To Prisons Act, sec. 3]	" T	" 20	" UUU	" 71
		" U	" 21	" VVV	" 72
955, ss. 8	[To Penitentiary Act, sec. 43, ss. 1]	" V	" 22	" WWW	" 48
		" W	" 23	" XXX	" 49
		" X	" 24	" YYY	" 50
		" Y	" 25		
956	[To Prisons Act, sec. 29]	" Z	" 26		
		" AA	" 27		

Note: *Bawdy-house cases—Being an inmate—Revised Crim. Code secs*, 238, 239, 773, 774.

The conviction having been made by a city stipendiary magistrate, the case would seem not to be dependent upon the vagrancy clauses alone (Revised Code secs. 238 and 239, formerly secs. 207 and 208). Under those sections there is a power of summary conviction, but under secs. 773 and 774 of the Revised Code (former secs. 783 and 784) there is a power of summary trial before any of the class of magistrates designated in revised section 771, including therein a city stipendiary magistrate.

Under sec. 773, whenever any person is charged before such magistrate with being an inmate of any bawdy-house (sub-section *(f)*), the magistrate may, subject to the subsequent provisions of the summary trials Part, hear and determine the charge in a summary way.

It is to be observed that the latter section contains no reference to the tem "vagrant." The charge as to which, *inter alia*, the "summary trials," procedure of Part XVI. of the Revised Code (formerly Part LV. of the Criminal Code 1892) applies is "being an inmate of a bawdy-house" and this alone would seem to validate an information and conviction following the words of revised sec. 773, where the summary trials Part can be relied upon to support the magistrate's jurisdiction.

For this particular offence the "summary trial," takes place without the consent of the person charged, (Revised Code sec. 774, formerly sec. 784).

A stipendiary magistrate is also a "justice," under the summary convictions Part, (see Revised Code sec. 2 (18) formerly sec. 839 *(a)*,) and it seems that for an offence not requiring the consent of the accused to a summary trial, and for which proceedings may be taken either under the summary convictions Part or under the summary trials Part, and disposed of by a magistrate having jurisdiction under both Parts, the only distinction in the statutory forms of conviction is that under the summary trials Part, the conviction should contain the additional words "being charged before me," in conjunction with the statement that the accused is convicted of the offence specified.

As to the limit of punishment for the offence of being an inmate of a bawdy-house see R. v. *Roberts* (1901) 4 Can. Cr. Cas. 253, and note in vol. 4 Can. Cr. Cas. 499.

Note:—*Continued.*

Bawdy-house cases—Being an inmate—Revised Crim. Code secs. 238, 239, 773, 774.

A summary conviction under the former sec. 207 (*j*) for being the keeper of bawdy-house was upheld in, R. v. *Leconte*, 11 Can. Cr. Cas. 41, although it did not contain the term "loose, idle or disorderly person," or the word "vagrant."

It should also be noted that by the revision of the Code an appeal has been provided from a conviction upon summary trial for keeping a bawdy-house, being an inmate of a bawdy-house or being a habitual frequenter: See Revised Code sec. 797. The section in the former Code, from which sec. 797 is derived had a very limited application, *i.e.*, to cases tried before two justices of the peace sitting together. The words " by virtue of this subparagraph" which were contained in the former Code, sec. 782 v. as amended by 58-59 Vict. ch. 40, sec. 1, are omitted from the revised section 797 as it now appears, and the right of appeal is made a general one in consequence.

[SUPREME COURT OF THE NORTH-WEST TERRITORIES.]

BEFORE SIFTON, C.J. AND WETMORE, SCOTT, NEWLANDS AND HARVEY, JJ.

THE KING v. MAGYAR.

Murder—Dying declaration—Belief of declarant that he will not recover —Declaration signed and sworn in narrative form—Admissibility—Revised Cr. Code (1906) *sec.* 259.

1. The essential element of a dying declaration is the abandonment of hope of recovery, and evidence tending to shew a belief that death was impending is not displaced by a statement of deceased to his physician and members of the family that he did not think he could recover, but he knew they would do all they could for him.

2. A written statement signed and sworn to by the deceased before a justice of the peace after being read over to him may be admitted as a dying declaration in a homicide case, although in narrative form not embodying the exact words of the declarant.

DECIDED: October 19, 1906.

Crown case reserved by WETMORE, J., upon the trial and conviction of the prisoner for the murder of one Campbell, as to the admissibility in evidence of a dying declaration.

N. Mackenzie, for the prisoner.
Allan, for the Crown.

The judgment of the Court was delivered by

HARVEY, J.:—This is a case reserved by my brother Wetmore as to the admissibility in evidence of a dying declaration made by one Campbell, of the murder of whom the above named Magyar was convicted. The declaration was as follows:

"Sworn statement of me, Donald J. Campbell, made this 22nd day of March, A.D. 1906.

"I know of no cause which led to the shooting other than the refusal of my hired man Vinceur Magyar refusing to do my just commands as an employee.

"On the morning of the 22nd of March, 1906, about sunrise, I was out in my stable doing my chores and loading manure on the manure sled, when the said Magyar swung open the door and said give me money. I said give me time till I get to the house. He immediately pointed the gun at me and shot me. He then left me where I fell, inside the stable door. No person was present at the time of the committal of the shooting.

"D. J. CAMPBELL.

"Sworn before me at Frobisher in the Province of Saskatchewan this 22nd day of March, 1906.

SAMUEL J. HOPPER.
A Justice of the Peace in and for the Province of Saskatchewan.

"Vinceur Magyar the accused was brought before me at 2.30 p.m. on this 22nd day of March, A.D. 1906, and I identify the said Vinceur Magyar as being the man who fired the shot which wounded me.

D. J. CAMPBELL."

Witness
"SAMUEL J. HOPPER.
"H. C. MACCOLL."

The reception of this declaration was objected to on the following grounds:—

1. That the evidence did not establish that the deceased had abandoned all hope of recovery.

2. It was not in the deceased's own words; it was prepared by another person.

3. It is in the nature of a deposition and should have been taken in the presence of the accused.

The trial Judge, in addition to the general question of guilty or not guilty, submitted to the jury the following question, which was answered in the affirmative, there being, the Judge states, sufficient evidence to warrant such answer: "Eliminating the statement of the deceased Campbell signed by him and put in evidence, and apart from that statement, does the rest of the testimony taken on the whole satisfy you beyond a reasonable doubt that the prisoner is guilty of the murder charged?"

The questions submitted for the opinion of the Court are:—

1. Was this statement properly received in evidence?

2. If not, in view of the answer of the jury to the question so submitted, should a new trial be ordered?

It will be observed that the declaration is in two parts, which were made at different times, but, inasmuch as the second part merely declares that the prisoner is the man who fired the shot, which is stated as a fact by the reserved case, and was, I learn

from the trial Judge, admitted by the prisoner himself, who gave evidence in his own behalf, it is not necessary to consider it, since it could have had no effect on the jury.

The general principle on which dying declarations are accepted as evidence is given by Russell on Crimes, vol. 3, p. 389, quoting from the judgment of Eyre, C.B., in *Woodcock's Case*, 1 Leach 500, as follows, viz., "that they are declarations made in extremity when the party is at the point of death, and when every hope in this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth: a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice."

The time when they are made in relation to the death furnishes no guide as to the admissibility or non-admissibility of such declarations, though it is a circumstance for consideration. Indeed, declarations made 10 or 11 days before death have been admitted, and declarations made a few minutes only before death have been rejected. The essential element is the abandonment of hope of recovery, and it is necessary in each case to examine the evidence to ascertain whether there is that absence of all hope which alone renders such a declaration admissible. In the present case we find that the deceased about 7 o'clock in the morning was shot with a shot gun at a distance of a few feet, the whole charge entering his abdomen, near the navel, making a hole about the size of a watch, from which 18 inches of intestine, which was severed, protruded. From this wound deceased died within 24 hours. Two doctors were in attendance within a short time after the wound was inflicted, and both were satisfied that there was no possible chance for the wounded man's recovery, and told him so. To his wife he said, "Annie, I am going to die," several times before the declaration was made, and added, "Whatever shall you do!" About the time the first doctor came, the deceased said to his brother-in-law, "Angus, do

you think there is any chance?" The brother-in-law replied, "It looks bad." And he answered: "Well you will do for the family what you can?" After this one of the doctors told him that if he had any matters to arrange he had better do so then, as he might not be able to do so later, and he then asked the doctor to make his will, telling him how he wished to dispose of his property. One of the doctors also states that he repeatedly said, "I am going to die, Jesus is coming for me," but he was not able to say whether these statements were made before the dying declaration was made or not.

The circumstances, apart from the utterances of the wounded man, are such as to lead almost irresistibly to the conclusion that he could have had no possible hope of recovery, but, taken with the statements made by him, I find myself unable to come to any other conclusion than that the wounded man fully appreciated his condition and understood that death was certain and near, and such being the case the condition of mind existed which would make a declaration admissible.

There was only one statement made which did not clearly point to that condition of mind, and that was the statement made to Dr. Deyell, who, when Campbell asked his opinion, said, "I am very sorry to say I have no hope of your recovery," whereupon Campbell said he didn't think himself he could recover, but he knew they would do all they could for him. This statement is somewhat equivocal, and might be only a manner of speech, or indicate a desire to put the doctors at ease, or might refer to what could be done to relieve his suffering. The doctor was asked by counsel, "Do you think he thought there was any possible chance of his recovery?" And he answered, "'From his statement I would not think so." And "Well, would you say he had lost all hope, do you think he had gone so far as that?" To which he answered, "From his statement to me I would infer that he had lost all hope." The doctor's interpretation of the man's meaning and his condition of mind, in view of the equivocal character of the statement, is useful, and it does not suggest any

ray of hope in the man's mind. Taken in conjunction with the other statements and the circumstances, I feel no doubt that the deceased had no hope of recovery when he made the declaration.

As regards the second objection, it appears from the evidence that questions were asked the wounded man, and the substance of the questions and answers in narrative form written out, as we have it here. This was read over to the wounded man, who then signed it and swore to it, the evidence shewing that he understood what he was doing.

In *Regina* v. *Mitchell*, 17 Cox C.C. 503, Cave, J., held that a statement to be admissible must be in the actual words of the deceased, and if questions are put both the questions and answers must be given.

This case, however, does not appear to be in accord with either the earlier or the later authorities which are mentioned in Archibald's Criminal Pleading and Evidence, 23rd ed., p. 324, nor, in my opinion, with sound reason. It is clear from the authorities that a dying declaration need not be in writing, and if evidence of such a declaration were being given by a person who heard it, he could not be expected to give the exact words with any degree of accuracy, but what he would give necessarily would be in his own words, the substance of what was said to the best of his recollection. But in this case, where the statements, after being written down, were read over to the deceased and accepted and signed by him, they did in effect become his own words.

In *The King* v. *Louie*, 7 Can. Crim. Cas. 347, the Supreme Court of British Columbia declined to follow *Regina* v. *Mitchell*, and held that a statement in narrative form obtained by questions through an interpreter, and not read over to the deceased after being written down, was admissible. That case goes much further than it is necessary to go in the present one, and, in my opinion, the second objection to the reception of this evidence, as well as the first, cannot be sustained.

The third objection was not urged in the argument, and it does not appear to be tenable. The declaration was not offered

as a deposition, but simply as a statement, and the fact that it was made under the sanction of an oath cannot give it less validity than a simply written or even oral statement, which would be admissible. As none of the objections can, in my opinion, be sustained, the first question submitted by the trial Judge should be answered in the affirmative, and such being the case the second does not require an answer, and the conviction should be affirmed.

Conviction affirmed.

[COURT OF KING'S BENCH, MANITOBA.]

BEFORE MATHERS, J.

THE KING v. DOUGLAS.

Binding over for appearance to answer indictment—Election of trial without jury—Speedy trial—Adding other charges not contained in recognizance to appear and plead—Right to elect on new charges if for substantially different offences—Cr. Code (1892) *secs.* 601, 767, 773—*Revised Cr. Code* (1906) *secs.* 696, 827, 834.

1. After an election for speedy trial without a jury, leave should not be granted to add other charges substantially different from those upon which his election was made, unless the accused is willing to elect speedy trial in respect also of such additional charges.

ARGUED: December 4, 1906.
DECIDED: December 5, 1906.

Motion to quash an indictment or to set aside or suppress it because of irregularity.

J. A. M. Aikins, K.C., and *C. P. Fullerton,* for the prisoner cited *Reg* v. *Goodman,* 3 O.R. 18 and *Rex* v. *Carriere,* 14 Man. R. 52, 6 Can. Cr. Cas. 5.

R. A. Bonnar, for the Crown.

N. F. Hagel, K.C., for the private prosecutor.

WINNIPEG, December 5, 1906.

MATHERS, J.:—On the 23rd day of March, 1906, the accused was arrested upon an information charging him with having on or about the 11th day of November, 1904, unlawfully "knowing the existence of an unregistered prior sale of real property to wit (describing it) in the Province of Manitoba, fraudulently mortgaged the above described real property to which he knew he had no legal or equitable title." And also that "at the place and on the day and year aforesaid did unlawfully obtain by false pretences the sum of seventeen thousand six hundred and ninety dollars from the Landed Banking and Loan Company with intent to defraud."

On the second day of April, 1906, before the preliminary investigation was proceeded with before the magistrate, another information was laid against the accused charging him with stealing on the 25th February, 1903, $1,000 and title deeds to the value of $3,000; also with having stolen $1,000 on the 1st October, 1903, and $3,195 on the 28th February, 1904. In this information the accused was also charged with having on the 28th February, 1903, unlawfully, by false pretences, caused and induced George Worsley to execute or make a valuable security, to wit, a promissory note for $3,175 with intent thereby to defraud and injure the said George Worsley, and with having unlawfully by false pretences caused or induced the same person to execute or make a certain valuable security, to wit, a promissory note for $2,000 with the same intent.

After hearing the evidence the magistrate bound the accused over under section 601 of the Code to appear at the next Superior Court of Criminal Jurisdiction and plead to the indictment that might be found against him "for and in respect to the charge aforesaid." The only charge mentioned in the condition of the recognizance is the one which I have first mentioned of having fraudulently mortgaged real estate.

Subsequently the accused, having surrendered to the custody

of the sheriff, was brought before the Chief Justice and elected to be tried speedily before a Judge without a jury.

Upon the trial of the accused the Crown preferred an indictment which, in addition to the charge upon which he was bound over by the magistrate, also contained eight other counts, three for theft, two for obtaining a valuable security by false pretences, one for having fraudulently made a sale of real property knowing of the existence of a prior unregistered sale, one of obtaining money under false pretences and another for conspiracy to defraud. The consent of the Chief Justice to prefer these additional charges was not obtained under section 773 of the Code and the accused has not waived his right to the trial of such additional charges by a jury.

I think it clear from such cases as *Reg.* v. *Goodman*, 3 O.R. 18, and *Rex* v. *Carriere*, 14 Man. R. 52, 6 Can. Cr. Cas. 5, that the accused must waive his right to a trial by jury upon such additional charges before he can be tried upon them by a Judge.

Upon all charges on which he has not elected to be tried by a Judge he has a right to trial by jury. The judgment in the *Carriere Case* is distinct that leave should not be granted by a Judge under section 773 for the addition of charges substantially different without the consent of the accused; this I take it to mean without his having elected to be so tried.

The case appears to me to resolve itself into this. The normal mode of trial of indictable offences is by jury. In the case of certain offences the accused may elect to be tried by a Judge without a jury, but he cannot be compelled to take such trial.

In the present case the accused has elected to be tried by a Judge upon one charge and, having done so, his right to trial by jury upon that charge is gone and he must be tried by a Judge. Upon the charges sought to be added he has made no election and, unless he now elects to be tried upon these additional charges by a Judge without a jury, following *Rex* v. *Carriere*, I must refuse leave to add them to the indictment.

Counsel for the Crown offered to waive all objections to the

accused now re-electing upon the charge on which he was bound over, but it seems to me the rights of an accused person depend upon what the law grants or withholds from him, and not upon the consent of the prosecuting counsel.

Leave refused.

Note: *Speedy trial—Additions and amendments to charge—Revised Cr. Code secs.* 834, 889, 890.

Notwithstanding the provisions of sec. 834 of the Revised Criminal Code, a Judge should not, against the wish of a prisoner, give his consent, at the trial before him, under the speedy trial clauses without a jury, to any other charge being preferred than that upon which the prisoner was committed for trial, unless it is clear that, while it may be more formally or differently expressed, it is substantially the same charge as the one on which he was committed for trial. *The King* v. *Carriere,* 6 Can. Cr. Cas. 5.

When the accused has elected a "speedy trial" upon charges in repect of which he has been bound over to answer an indictment, a new charge cannot be added in the County Court Judge's Criminal Court without the leave of the Judge, although founded upon the same depositions. The consent of the Judge under the speedy trial clauses to prefer another charge against the accused must be obtained before the charge is preferred. *The King* v. *Cohon,* 6 Can. Cr. Cas. 386.

The charge which may be added or substituted with the Judge's consent at a "speedy trial" under sec. 834 of the Revised Code, must be cognate to the one for which the accused was committed or bailed, and it is not permissible to add or substitute a charge wholly disconnected therewith. *The King* v. *Wener,* 6 Can. Cr. Cas. 406.

An amendment of a charge under the speedy trials clauses, should not be allowed if it involves the investigation of entirely new facts not disclosed in the depositions. *The King* v. *Clark,* 9 Can. Cr. Cas. 125.

A county Judge holding a speedy trial upon a charge of seduction may substitute a new charge to conform to the evidence of the prosecution by stating it as of a prior date upon which a different occurrence is sought to be proved, but such substitution

Note:—*Continued.*

Speedy trial—Additions and amendments to charge—Revised Cr. Code secs. 834, 889, 890.

is subject to the right of the accused to re-elect the mode of trial. As regards the offence of seduction the change of the date of the alleged offence by an amendment of the indictment or charge is in substance the laying of a new charge to which a different defence might be applicable. Sections 889 and 890 of the Revised Code (formerly Code sec. 723), apply to authorize an amendment as to time or place in a speedy trial charge without re-election, only where the act or transaction which forms the foundation of the charge is the same, and a mistake was made in the evidence or charge as to the true date of the occurrence. *The King* v. *Lacelle*, 10 Can. Cr. Cas. 229.

[SUPREME COURT OF CANADA.]

BEFORE MR. JUSTICE DAVIES, IN CHAMBERS.

GILBERT v. THE KING (No. 1).

Crown case reserved—Appeal—Extension of time for notice of appeal—Order after expiration of time for service of notice—Jurisdiction—Criminal Code, R.S.C. (1906) *ch.* 146, *sec.* 1024.

1. The power given by section 1024 of the revised Criminal Code (1906) ch. 146, to a judge of the Supreme Court of Canada to extend the time for service on the Attorney-General of notice of an appeal in a Crown case reserved may be exercised after the expiration of the time for the service of such notice.

DECIDED: February 1, 1907.

Application, on behalf of the prisoner, for an order extending the time for the service of a notice of appeal from the judgment of the Supreme Court of the North-West Territories, affirming the conviction of the prisoner, Wetmore, J., dissenting.

The prisoner was convicted, on 16th November, 1906, on the charge of murdering one Barrett Henderson, and sentenced to be hanged on the 18th of January, 1907.

Pursuant to the provisions of section 743 of the Criminal Code, 1892, the case was reserved for the opinion of the Supreme Court of the North-West Territories, *in banc*, and was heard on the questions reserved in the said Court on the 9th of January, 1907, at Calgary, in the Province of Alberta, and judgment was reserved. Subsequently, on the 15th of January, 1907, judgment was pronounced on the reserved case affirming the decision of Newlands, J., at the trial in respect to the matters objected to, by the majority of the said Court *in banc*, Wetmore, J., dissenting.

An application was then made to the Minister of Justice, at Ottawa, for a new trial under the provisions of section 748 of the Criminal Code, 1892, and, owing to the time occupied in correspondence, travelling from Regina to Ottawa, and obtaining a reply from the Minister, more than fifteen days elapsed after the date of such affirmance of the conviction, and, in the meantime, no notice of appeal therefrom had been served upon the Attorney-General as required by the provisions of section 1024 of the Revised Criminal Code, R.S.C. (1906) ch. 146. In consequence of the expiration of the time so limited, the application was made in Chambers for an order to extend the time for the service of the necessary notice.

Bethune and *Balfour*, appeared in support of the application.

OTTAWA, February 1, 1907.

DAVIES, J.:—An application was made to me, at Chambers, to-day on behalf of the prisoner for an order under the 750th section of the Criminal Code of 1892, now section 1024 of the Criminal Code, R.S.C. (1906), ch. 146, to extend the time for service of notice of appeal from the judgment of the Supreme Court of the North-West Territories refusing a new trial.

As the Court of Appeal was not unanimous in affirming the conviction of the prisoner he had a right, on serving notice on the Attorney-General "within fifteen days after such affirmance or such further time as may be allowed by the Supreme Court of Canada or a Judge thereof" to appeal to the latter Court against the affirmance of such conviction.

For reasons set out in the affidavits and exhibits produced before me, he did not give the notice of appeal and now, after the expiration of the fifteen days, applies for an extension of the time.

The only question upon which I had any doubt was as to my power to grant the extension after the expiration of the fifteen days. A construction requiring the application to be made within the fifteen days would, in a section such as this dealing with the criminal law and where sometimes, as in the case before me, the prisoner's life is at stake, be a very narrow one and might in many cases which can be conceived of in a country of the extent of the Dominion of Canada, if adopted, defeat the object which Parliament seems to have had in view. I, therefore, felt strongly inclined to adopt the broader construction and to hold that the power of extension is exercisable under the section even after the expiration of the prescribed period.

There are two authorities which seem to be conclusive upon the point. One is that of *Banner* v. *Johnston*, L.R. 5 H.L. 157, at pages 170 and 172, and the other that of *Vaughan* v. *Richardson*, 17 Can. S.C.R. 703.

Reference is also made to *The North Ontario Election Case; Wheeler* v. *Gibbs*, 3 Can. S.C.R. 374, which was discussed by Sir William Ritchie, C.J., in *The Glengarry Election Case*, 14 Can. S.C.R. 453, at page 460.

I have had the advantage of consulting with the Chief Justice and with Mr. Justice Girouard, who agree with me that in view of these authorities, there can be no doubt of my power to make the order.

Order for extension.

[SUPREME COURT OF CANADA.]

BEFORE FITZPATRICK, C.J., AND GIROUARD, DAVIES, IDINGTON, MACLENNAN AND DUFF, JJ.

GILBERT v. THE KING (No. 2).

Murder—Shooting—Plea that gun was accidentally discharged while held by accused—Flight of deceased—Pursuit by accused—Application of deceased for protection from accused—Res gestæ—Admissibility of statements—No evidence to reduce homicide to manslaughter—Judge's charge—Revised Cr. Code (1906), *secs.* 259, 260, 261.

1. On a trial for murder by shooting, evidence of statements made by the person shot immediately after the shooting and while under apprehension of further danger from the accused and requesting assistance and protection therefrom, is admissible as part of the *res gestæ*, even though the person accused of the offence was absent at the time when such statements were made.

2. Statements not coincident, in point of time, with the occurrence of the shooting, but uttered in the presence and hearing of the accused and under such circumstances that he might reasonably have been expected to have made some explanatory reply to remarks in reference to them, are admissible as evidence.

3. Where on the trial for murder the evidence was that the deceased had been killed by a gun-shot wound inflicted through the discharge of a gun in the hands of the accused and the defence was that the gun had been discharged accidentally, and no case of culpable homicide of less degree than murder was presented on the evidence, there could be no objection to a charge by the trial judge to the jury that the offence could not be reduced by them from murder to manslaughter, but that their verdict should be either for acquittal or one of guilty of murder.

ARGUED: February 25 and 26, 1907.

DECIDED: February 28, 1907.

Appeal from the judgment of the Supreme Court of the North-West Territories, affirming the conviction of the appellant at the trial on an indictment for murder, upon a reserved case stated by the Judge who presided at the trial.

The case reserved was stated by the trial Judge, Mr. Justice Newlands, as follows:—

"The above named Josiah Gilbert was charged before me with the murder of one Barrett Henderson on or about the 15th day of August, A.D. 1906, near Regina in this judicial district. The accused pleaded not guilty and was tried before me with a jury at Regina on the 13th, 14th, 15th and 16th days of November, 1906, and was convicted and sentenced to death by hanging at Regina on the 18th day of January, 1907.

"At the trial the annexed evidence was admitted after being objected to by counsel for the accused.

"After the verdict the counsel for the accused applied to have the following questions reserved and I have decided to reserve the same under sec. 937 of the Criminal Code for the opinion of the Court.

"1. Were the statements of the deceased made while running towards Dick and Koch and thereafter on joining them admissible?

"2. Were the statements made by the deceased to McKinnon on arriving at the house on the deceased's farm admissible?

"Said counsel for the accused also applied to have the following question reserved:—

"3. Was the learned trial Judge right in stating to the jury in his charge that there was no evidence to justify them in reducing the verdict from murder to manslaughter and that the case warranted only a verdict of murder or not guilty?

"In my charge to the jury I said, 'As far as manslaughter is concerned the Code states that culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation. As far as this case is concerned there has been absolutely no evidence put before you of provocation. As far as I can see in the case there is nothing that has been given in evidence that would justify a reduction of this charge from murder to manslaughter. The verdict as far as I can see

can either be one of not guilty, or that of guilty of murder: Those are the only two verdicts, as far as I can see, that are open before you.'

"No objection was taken to this charge at the trial so I declined to reserve this question."

After hearing the arguments of counsel, the Court, *in banc*, affirmed the conviction, the opinion of the Court being unanimous as to the first and third questions. Mr. Justice Wetmore dissented from the opinion of the majority of the Court as to the points of law involved in the second question.

Sifton, C.J., and Newlands and Stuart, JJ., concurred in the following opinion delivered by Mr. Justice Harvey.

HARVEY, J.:—"The accused was charged with murder and tried by my brother Newlands with a jury and convicted, and the matter now comes before this Court by way of a reserved case as to the admissibility of certain evidence which was given on the trial.

"Two men were passing near the scene of the alleged murder about the time it was supposed to have been committed and their attention was drawn to the accused whom they saw running with something in his hand, which they took to be a gun and which the subsequent evidence shews was a gun. At almost the same moment they heard a shout and saw the deceased apparently fleeing from the accused and waving his hands and calling to them to stop. The gun was dropped, but the pursuit continued until the deceased reached the witnesses, and on his way to them and when reaching them, he shouted more than once, 'Hold on, hold on; he shot me and he will shoot me again. Hold on, boys, hold on.' The first question which is reserved is whether the evidence of these statements was properly admitted, and I am of the opinion that this question should be answered in the affirmative. Apart altogether from whether the words were uttered in the presence of the accused, it appears to my mind clear that

the circumstances, including the utterance of the words used, were so closely connected with the shooting as to be properly admissible for, although the witnesses in question did not hear the sound of a shot, another witness did hear such sound and almost immediately after saw the two men running as they were when they first attracted the attention of the two witnesses first mentioned.

"The strongest case which could be referred to against the admissibility of this evidence was *Reg.* v. *Bedingfield,* 14 Cox 341, in which Chief Justice Cockburn refused to receive the evidence of a statement made by the deceased to a person whom she met after coming out of the house where the accused was and where the murder was alleged to have been committed. It is easy to see a difference in principle between the two cases. In the present case there was a continuity of circumstances of which the shooting was part and in which the accused was a participant, which did not exist in the *Bedingfield Case,* 14 Cox 341. So that for the purpose of this case it is not necessary to dissent from Chief Justice Cockburn's view though some of the text writers, (Taylor, par. 583; Phipson, p. 49), express the view that he interpreted the rule too strictly.

"In *Rex* v. *Foster,* 6 C. & P. 325, the Court, consisting of three Judges, held as admissible a statement made by the deceased in answer to a question by a witness who did not see the act which was the cause of the death but came up after. This case appears to have been accepted as authoritative, and the principle is given by Taylor, par. 583, as follows: "The principal points for consideration are, whether the circumstances and declarations offered in proof were so connected with the main fact under consideration as to illustrate its character, to further its object or to form in conjunction with it one continuous transaction."

"It appears to me beyond question that the present case falls within this principle and the authority of *Rex* v. *Foster,* 6 C. & P. 325.

"The second question reserved is as to the admissibility of evidence of an expression of the deceased at a later time and in no way connected with the *res gestæ*. An exchange of conveyances was being made by the deceased and the accused, and the witness states that while the deceased was being helped by him across, he turned around and saw the accused who was about five or six feet behind, whereupon "he made a big jump into the buggy and said, 'Don't let him knife me.' "

"This utterance appears to me to be nothing more than an unequivocal exclamation indicating fear of injury from the accused on the part of the deceased. The principle on which an exception to the rule that hearsay evidence is inadmissible is made in the case of statements made in the hearing of an accused, or in a civil case in the hearing of an opposite party, is that he has an opportunity of denying it, and if he fails to do so, it is some evidence as against him of the truth of the statement. When one considers that the utterance in question is not a statement of fact at all and is not susceptible of denial by the accused, it is at once evident that the principle has no application and at the same time the principle of exclusion as hearsay has no application. The question appears to me to be one then simply of whether the state of mind of the accused in this respect is material, and if it is, there is no rule as far as I am aware that requires the exclusion of this remark. It seems to me that the evidence of the witness when he said that when deceased saw accused near him 'he made a big jump into the buggy' stands in exactly the same position as the evidence of what deceased said, for each indicates the same thing, viz., fear of accused, and nothing more except that the spoken words are less equivocal than the act.

"The charge is one of deliberately shooting the deceased while the defence is that the shooting was purely accidental. If it were shewn that after the shooting the state of mind of the man shot were one of friendliness to the accused, it surely would be deemed to have an important bearing on the question in issue, and in the same way evidence indicating aversion and fear have

as important a bearing in the opposite direction. Wigmore, in his work on Evidence, points out very fully the difference between the admission of utterances as proof of the truth of the facts stated and their admission to prove a state of mind which he terms their circumstantial use as opposed to the other or testimonial use, and states, in par. 1790, that to the use circumstantially the hearsay rule makes no opposition 'because the utterance is not used for the sake of inducing belief in any assertion it may contain.'

"For the reason stated I am of opinion that this evidence was properly admitted.

"A third question, though not reserved, was argued by counsel, viz., that the learned Judge erred in charging the jury that there was no evidence to justify them in finding a verdict of manslaughter.

"No one gave evidence of the actual shooting except the accused himself, and his evidence and evidence of admissions made by him before the trial was the only evidence of the actual occurrence. These all concurred in maintaining that the shooting was purely accidental. If the jury had believed this evidence, the only verdict they could have found would have been one of acquittal; but if they did not believe it, the only conclusion from the evidence was that the shooting having been established the intention to effect the natural consequence of the act existed and that the act was one of murder. It is quite easy to see that a hypothesis could be advanced that the actual facts made the case one of manslaughter, but that the accused, being the only eye witness of the shooting, determined to concoct a story which would enable him to escape the consequence of even that act; but this would be simply a hypothesis, and the jury were bound to bring in a verdict on the evidence and not on hypothesis. I am of opinion that the Judge's charge was right in this respect.

"In the result therefore the learned trial Judge's rulings on the two questions reserved and on the other question which was argued should be confirmed and the conviction should be affirmed."

The opinion of Mr. Justice Wetmore was delivered as follows:—

WETMORE, J.:—"I agree with my brother Harvey that the evidence of the statements made by the deceased Henderson to the witnesses Koch and Dick while coming towards them and after he arrived there was properly admitted as being part of the *res gestæ*. I also agree that there was no misdirection in the case. But I am of opinion that the statement made by the deceased and testified to by McKinnon, namely, 'Don't let him knife me,' was improperly received in evidence. This statement was offered in evidence as a statement made in the presence and hearing of the accused and only upon that ground. It was not pretended that it was admissible on any other ground.

Evidence of this character is admissible because the jury or Judge of fact is able to draw an inference from the conduct, the language, or the silence of the other party in whose presence and hearing the statement is made. Evidently, if the statement was not heard by such party, no inference could be drawn from his conduct, language or silence. In this case I may say that any reference that might be drawn was to be drawn from the silence of the accused. In order to render such testimony admissible I think that the Judge ought to be thoroughly satisfied that the party accused heard the statement. I will concede that, ordinarily, if it is established that the statement was made in the presence of the accused and that he was at such a distance at the time that the statement would likely be heard by him, this would be sufficient to admit the evidence of the statement. But if the circumstances are of such a character that render it possible that the statement might not have been heard by him or render it doubtful whether it was heard by him, evidence of the statement ought not to be received. In this case the witnesses Koch and Dick were not very far distant from where the deceased and the accused were at the time the statement was made, and I think they would have been likely to hear it. Now, if they did not hear

it, I think it is open to doubt whether the accused heard it. I am not prepared, however, to state that I would hold that the evidence of this statement was improperly received if there was nothing further in the case than what I have stated. But it was developed at a subsequent stage of the proceedings that the accused was hard of hearing, and he distinctly swore that he did not hear the statement made by the deceased and testified to by McKinnon. This state of facts having come out, in my opinion rendered the testimony of McKinnon as to the statement inadmissible, or in other words improperly received. It is urged that inasmuch as the testimony when received was admissible, it is not rendered inadmissible by testimony subsequently given. I dissent from that proposition. If testimony of this character is received under a mistaken apprehension of facts it must be considered none the less inadmissible if future developments of facts shew that it ought not to have been admitted. In a case of that sort I am of opinion that either the jury should be discharged from giving a verdict or the objectionable testimony expressly withdrawn from their consideration by the trial Judge. I am inclined to think that the latter course would have been quite sufficient for the purpose. It was further urged that no substantial wrong or miscarriage was occasioned by the admission of this testimony. I cannot accede to this proposition either. It is very difficult to state what will or will not influence the mind of a juryman. The remark 'Don't let him knife me' had no direct reference to the shooting; it must be remembered that when the remark was made the accused had no gun with him and a remark such as 'Don't let him shoot me' would not be pertinent as he had no means of shooting. The words, 'Don't let him knife me' might be pertinent however, and it was a remark from which a juryman might infer 'Don't let this man who shot me, as I told you, knife me.' Nor can I bring my mind to the conclusion that this was a mere exclamation of fear alone. Doubtless it was an exclamation of fear, but it was an exclamation which not only expressed fear but ex-

pressed fear of the accused. I am of opinion, for the reasons above stated, that the conviction should be quashed and a new trial ordered."

OTTAWA, February 25 and 26, 1907.

Chrysler, K.C., and *James Balfour*, for the appellant. The statutory provisions affecting the case are to be found in the Criminal Code, 1892, secs. 742, 743, 744 and 750, and in the new Code as consolidated in the Revised Statutes of 1906, secs. 1013, 1015, 1016 and 1024.

The Court of Appeal, the Supreme Court of the North-West Territories, *in banc*, was not unanimous in affirming the conviction, Mr. Justice Wetmore being in favour of allowing the appeal and ordering a new trial; therefore, we comply with the condition of sec. 742 of the old Code. We come to this Court upon a judgment as entered there and we appeal against the affirmance of the conviction by a judgment which was not unanimous; it is of no consequence what might have been the individual reasons of any of the Judges for their opinions which led to that judgment.

We refer to the *Queen* v. *Cunningham*, Cout. Dig. 401; 18 N.S. Rep. 31; Taschereau Criminal Law (3 ed.), page 866, which is referred to in *McIntosh* v. *The Queen*, 23 Can. S.C.R. 180, by Taschereau, J., at page 185. The question has been since discussed in the case of *Viau* v. *The Queen*, 29 Can. S.C.R. 90, 2 Can. Cr. Cas. 540, in the judgment of the Court by Taschereau, J. In the present case the third question, although not reserved, was argued and decided in the court below which treated the point of procedure as having been waived. See also *Rise* v. *The King*, 32 Can. S.C.R. 480, per Strong, C.J.

We rely upon *Reg.* v. *Bedingfield*, 14 Cox 341, on which Lord Cockburn subsequently wrote a pamphlet which will be found in the Law Journal for 1880, at page 5. See also Best on Evidence, 10 ed., p. 410. Archbold in his work on Criminal Evidence, concludes that *Reg.* v. *Bedingfield*, 14 Cox 341, was affirmed by

the decision in *Goddard's Case,* 15 Cox 7. See also remarks on *Rex* v. *Foster,* 6 C. & P. 325, in Roscoe on Criminal Evidence, 12 ed., pp. 23, 24, and cases discussed at pages 48 and 49; *Reg.* v. *McMahon,* 18 O.R. 502; *Eastman* v. *Boston & Maine Railroad Company,* 165 Mass. 342; *Vicksburg and Meridian Railroad Company* v. *O'Brien,* 119 U.S.R. 99, and Greenleaf on Evidence, Vol. I., 16 ed., at pages 192 and 262.

Latchford, K.C., for the respondent.

OTTAWA, February 28, 1907.

FITZPATRICK, C.J.:—The appellant in this case was tried at Regina, Province of Alberta, in the month of November, 1906, and found guilty of the murder of one Barrett Henderson; thereupon he was sentenced to death.

The learned Judge before whom the case was tried, at the request of counsel for the prisoner to reserve some questions as to the admissibility of evidence, stated a special case for the opinion of the Court of Appeal. The questions reserved for the opinion of the Court were:

1. Were the statements of the deceased made while running towards Dick and Koch and thereafter on joining them admissible?

2. Were the statements made by the deceased to McKinnon on arriving at the house on deceased's farm admissible.

The counsel for the accused also applied to have the following question reserved:

3. Was the learned trial Judge right in stating to the jury in his charge that there was no evidence to justify them in reducing the verdict from murder to manslaughter and that the case warranted only a verdict of murder or not guilty?

The Judge in the case, as reserved, says:

In my charge to the jury I said: "As far as manslaughter is concerned the Code states that culpable homicide,

which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation. As far as this case is concerned there has been absolutely no evidence put before you of provocation. As far as I can see in the case there is nothing that has been given in evidence that would justify a reduction of this charge from murder to manslaughter. The verdict, as far as I can see, can either be one of not guilty or that of guilty of murder. Those are the only two verdicts, as far as I can see, that are open before you.

No objection was taken to this charge at the trial so I declined to reserve this question.

The Court of Appeal, Wetmore, J., dissenting, held that the statements made by the deceased to McKinnon on arriving at the house on the deceased's farm were admissible. The Court was unanimously of opinion that the statements made by deceased while running towards Dick and Koch and after joining them were properly admitted and also that there had been no misdirection.

A question was raised here as to whether an appeal lies to this Court on the question reserved as to which there was no dissent in the Court of Appeal, but as we all agree that the appeal should be dismissed we do not think it necessary to express any opinion on that point of practice nor as to whether or not the question of misdirection was ever properly before the court below. Sec. 1016, Criminal Code; *McIntosh* v. *The Queen*, 23 Can. S.C.R. 180, 185.

The first statement of the deceased was made immediately after the assault. The only evidence as to the actual shooting was given by the accused, but a witness, Vine Brooks, heard the sound of a shot and immediately afterwards saw two men whom she decribes as running away from the barn one apparently pursuing the other. Koch and Dick to whom the statement admitted in evidence was made were passing on the highway not

far from the barn in which the fatal shot was fired. When first seen by the witnesses, the accused was running through the field with something in his hand, which subsequent evidence shews was a gun, and, almost immediately, their attention was drawn to the deceased who was running from the accused towards them shouting, as they afterwards ascertained, for protection. The pursuit continued, although the gun was dropped by the accused, until the deceased reached the witnesses when he shouted to them several times as he approached—"Hold on, hold on, he shot me and he will do it again; hold on, boys, hold on."

When Koch and Dick were examined their evidence as to what occurred under these circumstances when the deceased approached them and immediately thereafter when with them in the vehicle was objected to. The trial Judge held it to be admissible and his ruling was sustained by the unanimous judgment of the Court of Appeal, and, as was intimated at the close of the argument here, we entertain no doubt that the evidence was properly admitted.

At the trial, in the Court of Appeal and at the argument here, counsel for the accused relied in support of their objection on the case of *Reg.* v. *Bedingfield*, 14 Cox 341, wherein the admissibility of this kind of evidence was discussed and Cockburn, C.J., excluded all testimony of declarations after the act was done. This ruling was much criticized at the time and led to a vigorous discussion of the whole subject by Judge Pitt Taylor, in England, and Professor Thayer, in the United States, in the course of which the Chief Justice issued a pamphlet in defence of his ruling wherein he defines the term *res gestæ*:

> "Whatever act, or series of acts, constitute, or in point of time, immediately accompany and terminate in, the principal act charged as an offence against the accused, from its inception to its consummation or final completion, or its prevention or abandonment,—whether on the part of the agent or wrong-doer in order to its performance, or on that of the patient or party wronged, in order to its prevention,

—and whatever may be said by either of the parties, during the continuance of the transaction, with reference to it, including herein what may be said by the suffering party, though in the absence of the accused, during the continuance of the action of the latter, actual or constructive,—as e.g., in the case of flight or application for assistance,—form part of the principal transaction, and may be given in evidence as part of the res gestæ, or particulars of it.''

There can be no doubt that under this definition the statement of the deceased to Koch and Dick would be admissible as "having been used under the apprehension of further danger and when asking for assistance and protection even if the accused was absent."

It will be observed further that in the *Bedingfield Case,* 14 Cox 341, when the woman Eliza Rudd came out of the house with her throat cut all action on Bedingfield's part had ceased and she was not fleeing as in the present case from her assailant.

In *Rex* v. *Foster,* 6 C. & P. 325, the Court, consisting of three Judges, held as admissible a statement made by deceased in answer to a question by a witness who did not see the act which was the cause of the death but came up after.

The case of *Aveson* v. *Lord Kinnaird,* 6 East 188, bears strongly upon the point, Park, J., and Patterson, J., concurring. In that case Lord Ellenborough said "if at the time she fled from the immediate personal violence of the husband I should admit what was said."

The admissibility of the second statement to McKinnon is not so clear. It was made under these circumstances: After the deceased running up to Koch and Dick in the road where they were joined by Gilbert had given his first explanation of the shooting and asked for their protection; the parties then present separated, Koch and Gilbert going to the latter's barn to get his team while Dick and the deceased went over to the shack in which Henderson lived with his hired man McKinnon who, on their arrival, very naturally asked for an explanation of the oc-

currence which has not been given in evidence. Subsequently, however, Gilbert appeared on the scene with Koch; then ensues a conversation with McKinnon during the course of which Gilbert attempted to explain that the shooting was due to an accident. The deceased who was being placed in a buggy, to be conveyed to the hospital at Regina for medical treatment, perceiving the accused who stood about six feet away from him made a jump exclaiming, "Don't let him knife me."

It has been argued that this statement of the deceased is not admissible as part of the *res gestæ* not being coincident in point of time with the main facts to be proved. However that may be we are all of opinion that the words spoken on this occasion are admissible on the ground that they were uttered in the presence and hearing of the accused, and under such circumstances, in the light of what he had previously stated to McKinnon, that he might have been reasonably expected to make some answer or remark in reply thereto or explaining that his proximity to deceased did not involve any such danger as he seemed to feel.

The presumption, even taking the previous statement of counsel as to the condition of accused's hearing as a fact, would be that he might reasonably be presumed to have heard. And the learned and careful trial Judge has in the exercise of a discretion vested in him decided the preliminary fact and allowed the evidence on the ground that the necessary conditions had been fulfilled.

The later statement of accused when giving evidence denying having heard the statement, could not have any effect on the previous ruling or become a test of its correctness.

The charge in view of the character of the defence and evidence in support of it cannot be complained of in so far as we can express an opinion in the absence of the text of the charge which is not before us.

There was no case of culpable homicide of less degree than murder presented on the evidence. And the accident testified to by the accused would have, if credited, entitled him to acquittal.

The appeal should be dismissed.

GIROUARD, J.—Following the decisions of this Court in *McIntosh* v. *The Queen*, 23 Can. S.C.R. 180; *Viau* v. *The Queen*, 29 Can. S.C.R. 90; *The Union Colliery Co.* v. *The Queen*, 31 Can. S.C.R. 81; *Rice* v. *The King*, 32 Can. S.C.R. 480, I feel that I have no jurisdiction to express any opinion upon the points of law involved in questions one and three. It was decided in those cases that no appeal lies to this Court on questions as to which there was no dissent in the Court of Appeal. For that reason I agree that the appeal must be dismissed as to those two points.

As to the second question, I concur in the reasons given by the learned Chief Justice. I wish to add merely a word. The trial Judge was undoubtedly the sole judge as to the admissibility of the statement or exclamation to McKinnon. He could not suppose that the prisoner, when standing within four or five feet, did not hear it. When, subsequently, the prisoner, being examined, disclosed the fact that he did not hear the deceased, the counsel for the prisoner does not appear to have requested the trial Judge to leave the veracity of this statement to the jury. Perhaps he did, and it may be that the Judge left the question to the jury. We have no means of knowing. At all events, the point is not reserved, and is not even mentioned by the learned Judge. I, therefore, believe that, as to this second question also, the appeal should be dismissed.

DAVIES, IDINGTON, MACLENNAN and DUFF, JJ., concurred with the Chief Justice.

Appeal dismissed.

[SUPREME COURT OF PRINCE EDWARD ISLAND.]

BEFORE THE HON. E. J. HODGSON, M.R.

RE THOMAS LYNCH.

Commitment after repeal of special statute under which Conviction had—Validity—Ministerial and judicial functions of magistrate—Duty not to delay commitment ordered by conviction—Canada Temperance Act, R.S.C. (1906) *c.* 152—*Revised Criminal Code* (1906) *secs.* 726, 727.

1. The issue of a warrant of commitment in execution of a summary conviction is a ministerial and not a judicial act.
2. Where a summary conviction has been made under a special statute and the statute is afterwards repealed, a commitment in execution may be issued notwithstanding the repeal.
3. It is the duty of a magistrate making a summary conviction and imposing a penalty of imprisonment to follow up his judgment with a commitment, and it is doubtful whether he has any discretion to suspend the issue of the warrant of commitment.

CHARLOTTETOWN, May 11, 1906.

HODGSON, M.R.:—This is an application for a *habeas corpus*. I granted a rule *nisi* on the 4th of May, returnable before the Court to-day. The facts are that Thomas Lynch was convicted before George Tweedy, Esq., the stipendiary magistrate for West Prince, for a second offence under the Canada Temperance Act. The conviction is dated the 6th September, 1905.

The operation of the Canada Temperance Act was revoked by Order-in-Council on 7th April, 1906. On the 24th April, that is 17 days after the Act had been revoked, a commitment was issued on the conviction before Tweedy, and Lynch was lodged in jail next day.

The question is could the commitment legally issue after the publication of the Order-in-Council of April revoking the Act?

Mr. Williams has argued that secs. 49 and 53 of the Interpretation Act do not apply to this question. Probably they do not. I decide this question independently of these sections.

I take it to be well-established law that when a statute prescribing the punishment for an offence or a crime is repealed after such offence or crime has been committed, but before final judgment of conviction, though after a verdict of guilty, no punishment can be imposed because the act must be punishable when judgment is demanded, and authority to render judgment must still reside in the Court. But when sentence has been pronounced and nothing remains but to fix the day when it shall

be executed, the case is not affected by the repeal of the law because the Court fixing the day of execution does not exercise judicial power, but only acts ministerially: see cases cited 26 Am. and Eng. Enc. p. 755.

In *Foster* v. *Medfield*, 3 Metc. at p. 5, Wilde, J., says:

> "The repeal of the statute did not vacate or annul a lawful commitment under it while it remained in force. It might as well be contended that a judgment for a penalty recovered by virtue of an existing statute would be vacated by its subsequent repeal. The commitment in this case was founded on an adjudication lawfully made by the Judge of probate for the County of Norfolk, who had jurisdiction of the subject matter upon the validity of which the subsequent repeal of the statute under which the adjudication and commitment were made, can have no effect."

Reg. v. *Denton*, 18 Q.B. 761, and *Ex parte Grisewood*, 4 De G. & J. 544, are quite consistent with this view of the law.

In this case the statute was in force and the magistrate had jurisdiction when: (1) the offence was committed; (2) the information was laid; and (3) the conviction was made (that is when judgment was pronounced).

Tweedy's judicial functions then ceased. The case was ended. All that remained was to sign the document sending the party to prison, a mere ministerial act, which need not be performed by the magistrate who pronounced the judgment, but by any other magistrate who may have had jurisdiction to hear and decide the matter: *Rex* v. *Crow*, 1 C.L.J. 302.

There is one matter I wish to refer to: it was not argued or referred to in any way, and I express no opinion upon it, but it seems to me a grave question whether magistrates possess the power they claim of allowing time to elapse before issuing the commitment unless they have provided for such delay in the conviction. It is the duty of the magistrate when he gives judgment to follow up that judgment with a commitment, and it is to me very doubtful whether he possesses the power to suspend

the execution of his sentence until for some reason or for no reason at all he pleases to execute it. It seems to me an assumption of authority which is open to the gravest doubt, and when questioned may be found to have serious consequences not only for the prosecutor but for the magistrate.

The rule must be discharged.

Discharge refused.

E. B. Williams, for the applicant.

Note: *Suspended sentence—Jurisdiction—Revised Cr. Code, sec.* 1081.

The above decision is applicable only to proceedings taken under the summary convictions clauses, Revised Code sec. 705 to 770 inclusive.

Section 1026 of the Revised Code gives express power to release the person convicted upon suspended sentence, if there are extenuating circumstances which make it appear expedient to the Court to release the accused "on probation of good conduct," if the offence is punishable with not more than two years' imprisonment and there has been no previous conviction proved. The person convicted must, however, enter into a recognizance, with or without sureties as the Court may direct, to appear and receive judgment when called upon and in the meantime to keep the peace and be of good behaviour. Revised Code sec. 1081.

The "Court" in sec. 1081 means, unless the context otherwise requires, any Superior Court of criminal juridiction, any Judge or Court exercising the "speedy trials" jurisdiction and any magistrate exercising the "summary trials" jurisdiction. Revised Code sec. 1026.

There is also the power under the "juvenile offenders" clauses (Revised Code secs. 800-821), to dismiss the accused if the justices upon the hearing of a case against a juvenile offender under sixteen years of age, consider it inexpedient to inflict any punishment. Revised Code sec. 813.

Where the offence is punishable with more than two years' imprisonment the Court has the like power as where the limit of punishment is not more than two years, provided that the Crown counsel concurs. Revised Code sec. 1081 (2).

[NEW WESTMINSTER COUNTY COURT, B.C.]

BEFORE BOLE, Co.J.

THE KING v. MORAES.

Perjury—Solemn declaration under provincial law—Marriage laws—Lawful hindrance—Marriage with girl under age—Consent of father—Revised Cr. Code sec. 148.

1. Perjury is not proved in respect of a solemn declaration that there was no lawful hindrance to deponent's proposed marriage by shewing that the deponent knew the girl to be under twenty-one and that her parent's consent had not been obtained as required by the Provincial law, if the marriage was valid notwithstanding the absence of such consent.

DECIDED: February 13, 1907.

The prisoner was charged with having on 4th November, 1906, committed perjury by falsely stating in a solemn declaration made under the Marriage Act, R.S.B.C. ch. 129, that there was no lawful hindrance to his marriage with one Maud L. Benson, although at the time the said Maud L. Benson was, to prisoner's knowledge, under 21 years of age, and the consent of her father to the marriage had not been obtained, such declaration having been made with intent to mislead the registrar and obtain a marriage license.

W. J. Whiteside, for the prisoner, called no evidence, but argued that neither the indictment nor the evidence led in support thereof disclosed any offence—pointing out that there was no statement in the declaration made by Moraes that could be construed as alleging that the consent of the girl's father to the marriage had been obtained.

W. M. Gray, for the Crown, contended that a clear case had been made out, and that the want of the father's consent was a lawful hindrance to the celebration of the marriage, and prisoner had declared there was no lawful hindrance thereto.

NEW WESTMINISTER, February 13, 1907.

BOLE, Co. J.:—It is hardly necessary to say that the criminal law of British Columbia is the criminal law of England as it stood on 19th November, 1858, save so far as the same is altered by enactment of the Parliament of Canada, ch. 144, R.S.C., and that sec. 24 of the Marriage Act declares that in all matters relating to the celebration of marriage, the validity thereof, the qualification of the parties, and the consent of parents, the law of England shall prevail, subject to the provisions of the Act itself. It will, therefore, be useful to consider what the English law on the subject is—confining the discussion to the question of consent to the marriage of a minor. By 26 Geo. II. ch. 33, want of this consent rendered the marriage of a minor null and void, but, as this barbarous statute inflicted terrible hardship and led to most disastrous consequences, it and an amending Act were repealed by 4 Geo. IV. ch. 76, sec. 1.

Section 16 of this Act, which is, for the purposes of this case, identical with sec. 17 of the British Columbia Act, requires the consent of the father, etc., of a minor to his or her marriage, but the Court of King's Bench in *Rex.* v. *Birmingham,* 8 B. & C. 29, unanimously held that the absence of such consent did not invalidate the marriage, which, notwithstanding no consent was given, was perfectly valid—and it seems to me that the words of the declaration in our Act are only intended to indicate to the person issuing the marriage license that the persons who are about to be married are not within the prohibited degrees of kindred or alliance, and that there is no other like impediment to destroy the validity of the marriage, but all doubt on the question, I think, disappears when one reads the declaration under 19 & 20 Vict. ch. 119 (Imp.), which states whether either of the parties is a minor or not, and where either is under 21 years of age, that the consent of his or her father, etc., has been obtained, which indicates that lawful hindrance does not necessarily mean or include want of consent.

There are several other serious legal difficulties in the way of supporting the charge as laid in the indictment, which, in my view of the case, it is not now necessary to discuss. In my opinion Moraes has not made a false declaration. Vide also *Rex* v. *Dunboyne,* 3 C. & K. 1; 6 & 7 Wm. IV. ch. 85; *Piers* v. *Piers,* 2 H.L. Cas. 331; *Holmes* v. *Simmons,* 18 L.T. 770.

I therefore acquit the prisoner.

Defendant acquitted.

[COURT OF APPEAL FOR MANITOBA.]

BEFORE RICHARDS AND PHIPPEN, JJ.A.

THE KING v. DUGGAN.

***Wilful making** of erasures in voters' list—Dominion Elections Act,* 1900, *secs.* 21, 22, 23, 41—*The Franchise Act,* 1898, *sec.* 10—*Revised Crim. Code sec.* 528.

1. When a returning officer, appointed to hold a Dominion election in an electoral district, selects one of the copies of lists of voters sent to him by the Clerk of the Crown in Chancery pursuant to the Dominion Elections Act, as the one which he will certify and forward to the deputy returning officer, for use at one of the polling sub-divisions, the copy so selected becomes a voters' list within the meaning of sec. 528, Revised Criminal Code, and it is an indictable offence for the returning officer wilfully to erase names of voters from it either before or after he certifies it and forwards it to the deputy.
2. Where the trial Judge has erred in withdrawing the case from the jury and directing a verdict of not guilty, a new trial may be ordered on a case reserved on the Crown's application.

ARGUED: October 15, 1906.

DECIDED: October 22, 1906.

Reserved case, stated at the request of the Crown.

The following case was reserved by Mr. Justice Perdue presiding at the trial.

At a sitting of His Majesty's Court of King's Bench, for Manitoba, held at Winnipeg for the trial of criminal matters and proceedings for the Eastern Judicial District, commencing on the 31st day of October, 1905, Laurence Duggan was indicted and tried before me on a charge of having unlawfully and wilfully, without legal justification or excuse, and without colour of right, made, or caused to be made, an erasure in and upon a certain voters' list, described as "List of Voters, 1904, Provincial Electoral District of Springfield, Registration District No. 3," made or prepared according to the law in regard to Dominion Elections, thereby committing an indictable offence under section 503 of the Criminal Code, 1892. The indictment in subsequent counts, further charged that the said Laurence Duggan similarly made, or caused to be made, an erasure of certain names (setting same out) from the same list made or prepared according to the law in regard to Dominion and Provincial Elections.

The evidence shews that, pursuant to sec. 32 of ch. 52 of the Revised Statutes of Manitoba, 1902, the Electoral Division of Springfield, which lies wholly within the Dominion Electoral District of Selkirk, was divided into nine registration districts numbered from 1 to 9 (both inclusive), the description and boundaries of which districts appear in the Manitoba Gazette, which was put in at the trial as exhibit No. 2, as corrected by exhibit No. 15. The description of No. 3 of said registration districts being as follows:—

"Comprising Townships 12 in Ranges 7, 8, 9 and 10 east, the east half of Township 13 in Range 7 east, and Townships 13 in Ranges 8, 9 and 10 east."

The Electoral District of Selkirk contained, with other divisions, parts of several Provincial electoral divisions, amongst which were Assiniboia and St. Boniface, and the voters' list for these two last mentioned Provincial electoral divisions, which were forwarded by the Clerk of the Executive Council in Winnipeg to the Clerk of the Crown in Chancery at Ottawa, were each headed "Registration division," and there was no mention of

polling division on either of the said lists of Assiniboia or St. Boniface.

The returning officer of the Provincial elections held in 1903, for the Electoral Division of Springfield, divided the said electoral district into eleven polling sub-divisions, (as appears by exhibit 14), by dividing two of the registration districts, but registration districts Nos. 1, 2, 3, 4 and others were not altered by him.

In the early part of the year 1904, the list of electors for the said Provincial Electoral Division of Springfield was revised; prior to which revision, notices were posted in the said eleven polling divisions, pursuant to sec. 9 of ch. 13, 3 and 4 Edw. VII., of the Provincial Legislature and said lists were revised by the revising officer, John O'Reilly, who made his return in June, A.D. 1904, to the Clerk of the Executive Council, which return and list so revised is exhibit No. 1, polling division No. 3 comprising the same area as said registration district No. 3, as appears on said revised list (exhibit No. 1). Pursuant to the provisions of the Dominion Franchise Act, as amended, the Clerk of the Executive Council transmitted to the Clerk of the Crown in Chancery, as required by sec. 10 of the said Act as amended, a copy of the said list (exhibit No. 1), except that 1903 was struck out, certified under his hand and having every alteration, addition or erasure thereon identified by his initials, which list was put in at the trial and marked exhibit No. 3. After the said list of electors, (exhibit No. 3), so sent to the Clerk of the Crown in Chancery, was printed by the King's printer, and authenticated by his imprint, registration division being placed there instead of polling division, on the heading thereof, one of which lists so printed is exhibit No. 4 filed at the trial. Laurence Duggan, the accused, was appointed returning officer for the said Electoral District of Selkirk, and accepted and acted in the office of returning officer for the election in the Electoral District of Selkirk.

Upon the issue of the writ for the Dominion election to be held in November, 1904, for the said Electoral District of Selkirk,

directed to Laurence Duggan, the returning officer therefor (a copy of which is exhibit No. 6), the Clerk of the Crown in Chancery transmitted by registered mail to the returning officer, the accused, Laurence Duggan, pursuant to sec. 21, of the Dominion Elections Act among other things therein required by the section to be transmitted, such as poll books, etc., the voters' lists printed as aforesaid of the areas comprised within the boundaries of the said Electoral District of Selkirk, as defined by the Representation Act, 1903, and among the lists of voters so transmitted, was a list of voters for the Provincial Electoral Division of Springfield (being identical with and the same as exhibit No. 4), and including registration district No. 3, of said Electoral Division of Springfield), all of which lists bore the imprint of the King's printer and having printed upon them respectively, at the top thereof, the territorial area for which they were lists, and the territorial areas in respect of the Electoral Division of Springfield were entirely within the said Electoral District of Selkirk.

Exhibits Nos. 5 and 18 were identical with said lists then so transmitted to the said returning officer, Duggan, and were then in the condition in which they were when printed, and had not then any names, residences and additions struck out, or any red lines or other marks thereon. That is to say, they were identical with the same as exhibit No. 4, in so far as the same relates, according to the heading thereof, to registration districts Nos. 1, 2, 3, and 9.

The accused, Laurence Duggan, received a printed list identical with exhibit 5, printed by the King's printer, and bearing his imprint, without any erasures thereon, and he delivered to the deputy returning officer, Calverly, list (exhibit 5), with the names erased in red ink certified at the bottom as follows, in his own handwriting:—

"Certified correct,

"L. Duggan, R.O."

and marked at the bottom, "Selkirk Poll No. 9."

and this list so certified, with the erasures above mentioned, was intended by the returning officer as the list to be used by Calverly at that Dominion election, and was delivered for the purpose of said Dominion election, for the Electoral District of Selkirk, by the said returning officer, Duggan, to the deputy returning officer, Calverly, who was the deputy returning officer in the said Dominion election for polling district No. 9, the poll for which was held at Beausejour, being the same place at which the poll for polling division No. 3 in the Provincial election, 1903, was held, and when the said list was so received by the said Calverly, being the list described as "List of Voters—1904, Provincial Electoral District of Springfield, Registration District No. 3, comprising Townships 12 in Ranges 7, 8, 9 and 10 east, the east half of Township 13 in Range 7 east, and Townships 13 in Ranges 8, 9 and 10 east," and marked at the end thereof, "Selkirk Poll No. 9," such list as the other lists had, and bore the writing, "Certified correct, L. Duggan, R.O." in the handwriting of the accused. The evidence does not disclose whether the said certificate of the accused on the first sheet of No. 5 was made by him before or after the said erasures, but said list, when delivered to the deputy returning officer, Calverly, had both the erasures and certificates thereon. The said list so received from the accused was the list used by the said deputy returning officer Calverly at said poll No. 9, Beausejour, and the deputy returning officer at the close of the said poll returned the said list enclosed in the ballot box, with the poll books and other documents, to the returning officer, Laurence Duggan, the accused, who in turn sent the documents which he found in the ballot box, pursuant to the provisions of the Dominion Elections Act, to the Clerk of the Crown in Chancery, who produced the said lists and papers at the trial, in the condition in which he received them from the said returning officer.

During the said Dominion election for the Electoral District of Selkirk, several persons whose names had been on the said list, but which names had been erased therefrom, by red line

drawn through their name, including those whose names are mentioned in the indictment, and being persons entitled to vote at the said poll at Beausejour at said election, presented themselves and were refused ballot papers by the said deputy returning officer, for the reason that their names were so erased.

At the close of the evidence for the Crown, I withdrew the case from the jury, and a verdict of "Not guilty" was entered by my direction, my reasons for so withdrawing the case from the jury and directing a verdict of "Not guilty" are hereto annexed. The question for the opinion of the Court is:—

Did I properly withdraw the case from the jury and direct a verdict of "Not guilty" to be entered?

The exhibits herein referred to and the evidence are made part of this case.

Dated October 11, 1906.

(Signed. W. E. PERDUE, J.A.

WINNIPEG, October 15, 1906.

J. A. M. Aikins, K.C., and *H. W. H. Knott,* for the Crown. Section 481, sub-sec. 2, is to be read into the definition under Code sec. 503. By the Act of 1903, ch. 13, sec. 1, the words "or polling places" were struck out and a sub-section added requiring two deputies at polling places where there are more than 250 electors. In 1904, ch. 13, sec. 73, reinstated those words and changed "registration districts" to "polling divisions." The local constituency of Springfield was wholly within the Dominion constituency of Selkirk. The notices of the revision of the voters' lists for the local constituency of Springfield were posted in the 11 polling divisions made by the local returning officer for the purposes of the Provincial election held in 1903. There were 11 polling divisions made up at the revision in 1904 and the revised lists for those 11 polling divisions were sent to the Clerk of the Crown in Chancery, and that was the only way the revision could have been made under the Manitoba Act. These 11

polling divisions so constituted were established by or under the laws of the Province of Manitoba for the purpose of the Provincial elections within the terms of the Franchise Act, 1898, ch. 14, sec. 5(*b*), and the lists prepared and revised for these polling divisions were the lists contemplated by sec. 5(*c*) of the same Act. It comes down to this, was the list a "list" within the meaning of the Code? The area is clearly defined in exhibit 5 and there was a separate list for that exact area. Lamothe's evidence shews he sent two lists for each polling division. Section 21 of the Dominion Elections Act says a "sufficient" number. By printing this list the Dominion authorities made it their list within sec. 503 of the Code. Polling division is defined by R.S.M. 1902, ch. 52, sec. 2(*l*). The Franchise Act, 1898, 61 Vict. ch. 14, sec. 4, sub-secs. (*d*) and (*e*) are practically the same as the above. See also sec. 7 of the same Act. Section 22 of the Dominion Elections Act indicates how the returning officer can find out what the Provincial polling divisions are. The section is mainly for that purpose. Section 8 of the Franchise Act shews where the revising officer can himself prepare a list. Section 10, sub-secs. 3-8, provide for the printing by the Clerk of the Crown in Chancery. Section 8 of the Franchise Act shews that the returning officer can prepare a new list from existing voters' lists only where a Provincial polling division lies partly within a Dominion constituency and it implies that such lists are original lists, it does not say he is to prepare it from copies of the lists. The Franchise Act, sec. 10, sub-sec. 6, says all voters' lists so printed by the King's printer shall be authenticated by his imprint. In the same sub-section it refers to copies of lists shewing that the terms are used interchangeably. The only reference to certification of copies in the Franchise Act is contained in sec. 10, sub-sec. 7, providing for certification by a Provincial officer only, not a Dominion officer and under special circumstances. While sec. 21 of the Elections Act refers to "copies of voters' lists," sec. 22 refers to them as "lists." The only powers of a returning officer to deal with lists are under secs. 7 and 8 of the Fran-

chise Act. In the Dominion Elections Act, sec. 41, sub-sec. (c), a list is called a "copy" and referred to as such after first being certified. That shews "copy" to be used as synonymous with "original." If a list under sub-sec. (c) of sec. 41 of the Dominion Elections Act is not certified, it still would be a valid one for a deputy returning officer to act on. That certification is merely for the identification of the list. The amendment to the Franchise Act of 1901, ch. 15, sec. 2, shews that in certain cases the Provincial law may be followed by the Dominion officials to prepare lists. This is the only Dominion revision. This shews returning officers are not expected to revise. In the *Richelieu Election Case,* 21 S.C.R. 168, the copy was certified by a returning officer and there was no power in him to make a copy evidence by certifying it. See *Re Brandon,* 9 M.R. 511; *Re Provencher,* 13 M.R. 451. As to interpretation of statute: *Hardcastle,* 455; *Maxwell,* 394; *Lyons' Case,* Bell's Crown Cases 45; *Nicholson* v. *Fields,* 7 H. & N. 810; *Dominion Interpretation Act,* R.S.C. 1886, ch. 1, sec. 7, (56).

E. L. Howell, for Duggan. The case of *Re Brandon* was under R.S.M. 1892, ch. 49, sec. 148. In that case there was under the principal Act no requirement that the returning officer should certify to the correctness of the lists. "Registration district 3, Springfield," is only a part of "Polling division 9, Selkirk." Within polling division 9 are portions of two other districts, in addition to registration district 3 of Springfield. The northern line of townships in Springfield 3 were taken out of Selkirk 9 and put in another. Townships 13, as shewn in registration district 3, Springfield, were left out of polling division 9, Selkirk. By his proclamation the returning officer fixed "Polling division 9, Selkirk." There are three arguments in favour of the accused: (1) on the proper construction of criminal statutes, (2) that which was changed was not a list, (3) that even if it was a list it was not made, prepared, or drawn, according to any law of any kind, as required by sec. 503 of the Code. As to construction of statute: *Dyke* v. *Elliot,* L.R. 4 P.C. 191; *The King*

v. *Hodnett*, 1 T.R. 101. "Voters' lists," what are they? The Dominion Elections Act, sec. 3, sub-sec. (*d*), speaks of a "voters' list" or a "list of voters" as being an "official" list. Sections 21, 22, sub-secs. 3, and 41 refer to lists as "copies" before they leave the returning officer's hands certified. But sections 64, sub-sec. 3, 69, sub-sec. 3, 83, sub-sec. 3, and 92, sub-sec. 3, refer to them as "lists" after they leave the returning officer's hands and after they have left the deputy's hands the word "copy" is never used, but only "voters' lists." See form V to the Act and form Y in the former Elections Act. Section 88 draws a distinction. A polling division (not a registration division) is defined in sec. 3, sub-sec. (*f*).

WINNIPEG, October 22, 1906.

RICHARDS, J.A.:—This is a reserved case, stated by Mr. Justice Perdue at the request of the Crown.

At the fall assizes, 1905, Duggan, who had been returning officer for the Electoral District of Selkirk at the Dominion election of 1904, was tried on a charge of having unlawfully and wilfully, without legal justification or excuse and without colour of right, made or caused to be made an erasure in and upon a certain voters' list described as "List of Voters, 1904, Provincial Electoral District of Springfield, Registration District No. 3," made or prepared according to the law in regard to Dominion elections.

Other counts in the indictment specified names said to have been erased from the list, but were otherwise similar. Particulars of the facts put in evidence by the Crown are stated in the reserved case.

At the close of the evidence for the Crown the learned trial Judge withdrew the case from the jury and directed them to return a verdict of "Not guilty."

The question for the opinion of this Court is whether he was right in so doing. I think the question can be stated as follows:

Was there or was there not such evidence produced by the Crown that, if the case had not been withdrawn from the jury, and if no evidence had been given for the defence, and if the jury had, in the exercise of their discretion, chosen to find the defendant guilty on any count of the indictment, a Court of Appeal would be justified in holding that that verdict was such as reasonable men would be justified in finding?

If there was such evidence, our answer, it seems to me, must be that the case should not have been withdrawn from the jury.

The contention for the defendant is that, under sec. 22 of the Dominion Elections Act, a returning officer is required or permitted to fix the limits of polling divisions, and necessarily therefore to deal with the lists of voters sent him by the Clerk of the Crown in Chancery by so altering them that they shall suit the limits of the divisions that he so fixed.

I find myself unable to accept that view. Section 22 only requires, I think, the returning officer to get the documents or papers (other than voters' lists) named in that section, for the purpose of ascertaining what the already established polling divisions are.

It is argued that the provisions of that section, as to his getting from their legal custodians such Provincial "voters' lists or copies thereof or certified extracts therefrom as he requires in addition to the lists supplied by the Clerk of the Crown in Chancery," imply that he has to make up new lists, for the making of which those he got from the Clerk of the Crown in Chancery would probably not be numerous enough, as he would require, in making new lists, to cut up and alter and take extracts from those already prepared. It is urged that, unless that power were implied to make new divisions, the lists so got from the Clerk of the Crown in Chancery would be enough and there would have been no reason for the enactment allowing the returning officer to get Provincial lists. The inference seems to me too far drawn. But, if it is asked why he should otherwise have the power of getting further lists than those sent him, the

answer is twofold. The Clerk of the Crown in Chancery might, by mistake, not send enough lists for use where there was to be no alteration of boundaries. And there are cases possible, as provided for by secs. 7 and 8 of the Franchise Act, 1898, where lists have to be changed in some respects, and where such extra lists as already printed might be needed to give the returning officer enough to cut up and use for the purpose of such changes. But the provision of such secs. 7 and 8 do not affect the present case.

The above argument seems to me untenable in view of sec. 5 of the said Franchise Act, which says: "For the purposes of any Dominion election, held within the limits of a Province except as hereinafter otherwise provided.

"(b) The polling divisions shall be those established by or under the law of the Province for the purpose of Provincial elections within the territory comprised in the electoral district for which such election is held.

"(c) The voters' lists shall be those prepared for the several polling divisions so established and which, on the sixtieth day next preceding the day fixed for nomination of candidates for such Dominion election, were in force or were last in force under the laws of that Province for the purposes of Provincial elections."

It was admitted by defendant's counsel on the argument that the defendant did in fact, by his proclamation under sec. 16, alter the area of the polling division to which the list which he is charged with altering applied. He took off part of the area and added territory not previously in the division.

It was argued that, even if he had done that wrongly (as it seems to me that he did) it, nevertheless, became necessary as a result of that alteration that he should alter the list so as to make it correspond with the new limits, and that such latter alteration thereby became his duty and that as a result he could not be punishable for making it wilfully, but that his only liability, if any, would be for the alteration of the area of the division.

The contention, if sound, would imply that, because he committed a breach of the law, which he should have known would necessarily cause him to commit a further breach, he is not to be responsible for committing the second breach. If that were good law then, if statutes forbid changes in the divisions and also forbid changes in the lists, but provided penalties for the latter offence only, a returning officer who wished to alter the lists to favour a candidate could do so with impunity by first deliberately altering the divisions and then justifying under such last named alterations when charged with having changed the lists.

Where a man commits a breach of law knowing that it will necessarily involve his committing another breach, and he does also commit that other breach, it seems to me that to the extent to which the law provides penalties for such breaches he is liable to punishment for either, or for both of them.

Even if the defendant's contention were correct and if the changing of the divisions justified, as a matter of necessity, the changing of the lists to correspond, the onus lay on the defendant to shew that he made no other changes in the lists than such as were thus made necessary, and the case should have been left to the jury to say whether he did or did not exceed that limit.

It is further claimed, on the defendant's behalf, that because the polling divisions are so called in the statute, and the caption of the list in question uses the words "registration district" instead of "polling division" the defendant was so misled as to really think there were no polling divisions and to believe that, therefore, under sec. 23 of the Dominion Elections Act, it was his duty to create the polling divisions that were to be used at the election for which he was returning officer.

I find it difficult to believe the defendant could have been so misled. The territory covered by the list is specified in its caption and corresponds with the territory of polling division No. 3 according to the legal division into polling divisions of the Provincial Electoral District of Springfield. The words "Registration district" as used in the caption obviously mean the same

thing that is signified by the words "polling division" in the statute. Such an error, if genuinely made, would not, in law, excuse the breach charged, though, in case of the defendant's conviction by the jury, the trial Judge, if he believed the defendant to have been misled, would be influenced by that fact to mitigate the severity of the sentence.

It is further claimed that, because at the Provincial election for Springfield in 1903, the Provincial returning officer divided two of the theretofore established polling divisions each into two divisions, thus increasing the number from 9 to 11 and because in the Provincial revision of voters' lists in 1904 those eleven divisions were maintained, the legal effect was to wipe out the whole sub-division of Springfield for polling purposes and leave it without any sub-divisions for the purpose of Provincial elections, which again, under sec. 23 it is claimed, would authorize the defendant in establishing such polling divisions as he deemed necessary.

I find that argument also impossible of acceptance. Polling sub-division No. 3 for Springfield, the voters' list for which is now in question, was not interfered with by the Provincial returning officer. At the time of the Dominion election, at which the defendant was returning officer in 1904, that polling division existed exactly as it had been established prior to the Provincial elections of 1903.

There remains, however, a question, as to which I have felt much doubt. It is claimed that what was altered could not be a voters' list within the meaning of sec. 503 of the Code until after it was certified by the defendant as returning officer, under sec. 41 of the Dominion Elections Act, and that there is no evidence or legal presumption that the alterations in question were made after such certification.

Section 41 says: "On a poll being granted, the returning officer shall (c) furnish each deputy returning officer with a copy of this Act and one copy of the voters' list if there is one, for the polling division for which he is appointed, *such copy of the voters' list being first certified by himself.*"

The use of the word "copy" in the above is relied on to shew that the Act does not treat the document as other than a copy, till certified as above. It seems to me that "copy" and "copies" are used in the Act in the sense of "duplicate" and "duplicates." The Act seems to use interchangeably the expressions "voters' lists" and "copies of voters' lists." In section 21 it provides that the Clerk of the Crown in Chancery shall transmit to the returning officer "copies of voters' lists," while in section 22 the same documents so transmitted are called voters' lists.

It is pointed out that numbers of such printed lists are distributed to candidates and get into the hands of many people other than returning officers. Such lists get mutilated and interlined in committee rooms to prepare them for use by scrutineers and agents of the candidates. It is argued that, if a returning officer can be held liable for changing precisely similar lists, then all people who have altered such lists in committee rooms and elsewhere are equally open to prosecution under section 503 of the Code.

The answer seems to me to be that section 503 only makes crimes of the acts named in it when these acts are done "wilfully." If the word "wilfully" only meant "voluntarily" or "knowingly" the argument would perhaps have more substance. But I think the word, when used as a part of the definition of a crime, means more than that. Its true meaning in such a case seems to me to be that given it by Mr. Justice Wurtele in *Ex parte O'Shaughnessy,* in 8 Can. Cr. Cas. at the top of page 139. The learned Judge says there: "Wilfully means not merely to commit an act voluntarily, but to commit it purposely with an evil intention, or in other words it means to do so deliberately, intentionally and corruptly and without any justifiable excuse."

With that meaning attached to "wilfully" the section of the Code would not make it a crime to cut up lists furnished for the legitimate uses of an election organization.

While meeting, as it seems to me, the defendant's argument

as above, the foregoing does not, however, prove that the document shewn in this case to have been altered was, or was not, at the time of such alteration, a voters' list within the meaning of section 503.

In the present case, when the defendant received from the Clerk of the Crown in Chancery the voters' list, or copy of the voters' list in question, the alterations complained of had not been made in it. When he delivered it, certified, to his deputy for use at the poll, the alterations had been made.

We must, I think, try to so construe section 503 that it will, with regard to voters' lists for Dominion elections, be of the use for which it was intended.

The certification, which has been relied on by defendant's counsel as the act which gives the document life as a voters' list, seems to me to be only intended as a means for the subsequent identification of the list as the one given by the returning officer to the deputy and used at the polling. I do not think it could be seriously urged that, if a returning officer omitted to certify the lists given to his deputies, and such lists were otherwise correct, the mere absence of the certification could affect the legality of the election held on these lists.

Whether the lists, as sent to the returning officer, as as got by him, from the Provincial authorities as provided for in section 22 of the Dominion Elections Act, are, or are not, when received by him, each a voters' list as contemplated by section 503, it is difficult to say. But it seems to me that, considering the powers with which a returning officer is clothed, and his right to choose which of the duplicates furnished to him he will give to his deputy for the purposes of the poll, it is reasonable to hold that, when he selects one of them as a list to be furnished to the deputy for the polling division named therein, it must then become, if it is not already, a document which, at least as against his own wrongful acts, is a voters' list within section 503 of the Code, and that it must remain such so long as his intention to so use it continues, and further that, if, after so selecting it, and

during the continuance of his intention to so use it, he alters it, the fact that he makes such alteration before, or after his certification of it, is immaterial so far as concerns his liability under section 503.

In answer to a suggestion of the above an argument was put in the shape of questions thus: If, after selecting from the lists in his possession a particular list as the one to be used at the polling in the polling division that it relates to, and if, after such selection, the returning officer wilfully alters it, and if he, thereafter, decides not to use that particular duplicate of the list, but to use another duplicate of the same list, and if he then, after such change, destroys or throws away the one first chosen and so altered and in fact uses and delivers to his deputy the list secondly decided on, was he guilty of a crime, under section 503 of the Code, by his wilful alterations of the list first chosen? If he did not thus commit a crime, how could the list, which he so altered, be a voters' list within section 503, or anything more than a paper that, by certification under section 41 of the Dominion Elections Act, but not till then, would have become such a voters' list? And does it not result from the foregoing that there can be no authentic voters' list till the returning officer certifies one?

The argument implied in these questions must be that no one of the lists received from the Clerk of the Crown in Chancery, or got by the returning officer from the Provincial authorities under the powers given him in section 22 of the Act, can be a list within section 503 so long as it is within the returning officer's power to reject it and substitute another for use at the polling. If a valid argument, it destroys the defendant's own contention that the certification is what makes the list official, because, so long as the returning officer retains possession of the list, he can destroy it, whether certified or not, and substitute another.

The argument means, when pushed to its conclusion, that the document is not a voters' list till actually parted with by the

returning officer, viz., by delivering it to his deputy. It therefore further implies that the returning officer can alter the list with impunity, so long as, certified or uncertified, it remains in his hands. The answer to this argument is that, under the circumstances supposed by the first question, the returning officer would be guilty of the crime in question, though it is true that no evil results would follow and it would probably be impossible to detect the crime, owing to the evidence of the selection and intent being in the breast of the returning officer. The argument is fallacious in implying that the commission of an act, declared by a statute to be a crime, does not constitute that crime unless the evil that the statute intended to guard against happens to result from that act, and unless it is so committed that evidence of its commission can be had.

I have, as stated above, arrived at the above conclusion with much hesitation. At first I was inclined to the view taken by the learned trial Judge. But it seems to me, on careful consideration, that any other conclusion would render section 503 of the Criminal Code useless to punish a returning officer at a Dominion election for altering the lists, and would put it in his power to so change the lists with impunity that he could, in fact, give the election to whichever candidate he chose.

Holding the law to be as above, I think the proof that the defendant delivered the list to his deputy, with the alterations already in it, is *prima facie* evidence that, at the time when he made the alterations, he intended that document to be the voters' list for use at the polling.

With great respect to the ruling of my learned brother, I feel obliged to answer his question in the negative, and I think there should be a new trial.

PHIPPEN, J.A.:—It is needless for me to repeat the facts affecting this appeal. They are concisely and fully set out in the case stated by the learned trial Judge for the opinion of this Court.

After very careful consideration I am of the opinion that the question referred should be answered in the negative. I assume that any changes in exhibit 5 were made by the accused. There is at least some evidence to go to the jury and my brother Perdue would not therefore have been justified in withdrawing it on this ground. Neither did he profess to do so. From the language of the stated case I take it our minds are in entire accord on this point.

The learned trial Judge appears to have based his decision on two grounds: First, that under the Elections Act the returning officer on appointment had authority under the provisions of section 10 of the Franchise Act of 1898 and sections 22 and 41 of the Dominion Elections Act, 1900, to create the voters' list upon which the elections were to be held, and, Second, that the voters' list referred to in section 503 of the Criminal Code is a list as defined by the Dominion Elections Act.

The first ground was not supported on the appeal by counsel for the accused and need not, therefore, be now considered. As to the second ground, it appears to me we can get but little assistance from the wording of the Elections Act. Section 503 of the Criminal Code declares every one guilty of an indictable offience who, under certain circumstances, makes any erasure in any voters' list made "in regard to any Dominion, Provincial, municipal or civic elections." What the Court has to determine is what is a voters' list within the meaning of the Code? What Parliament has defined as a voters' list in another Act may be of some assistance in reaching a conclusion, but when we observe the Code makes it equally an offence to alter any voters' list, whether prepared for the purpose of a Provincial election, municipal election or civic election, as well as for a Dominion election, when we remember that the Provincial, municipal and civic legislation of any Province may contain many different definitions of a voters' list and may be amended and altered from time to time, and that the Code is equally applicable to all, it does not seem to me that a definition in any particular election

Act can finally determine the interpretation to be placed on section 503 of the Criminal Code.

But an analysis of the Election Act does not disclose any clearly drawn distinction between "list" and "copy of list" as these expressions are used in the Act. For example, while section 21 refers to copies of lists being forwarded by the Clerk of the Crown in Chancery, section 22 refers to these same copies as "lists."

What the Court must endeavour to do is to place a fair construction on the language of the Act, having regard to the mischief it was intended to remedy. The Court must not create an offence because in its opinion it comes within the scope of the mischief: *Re The Gauntlet,* L.R. 4 P.C. at p. 191; but it must not lose sight of the mischief in endeavouring to place a reasonable interpretation upon the statute.

There is no doubt that section 503 of the Code was framed to avoid alterations or erasures in lists which might prevent those legally entitled from exercising their franchise, or allow unqualified persons a voice in the election of a member.

Bearing this in mind and assuming findings against the accused where there was evidence to go to the jury, what are the facts?

The Clerk of the Crown in Chancery had in his possession original lists, original in the sense that they had been prepared under the provisions of the Manitoba legislation to be forwarded to him as the basis of a Dominion election. Of these he had printed copies, pursuant to the requirements of section 10 of the Franchise Act. Immediately the writ of election was issued, it became his duty by section 21 of the Elections Act to transmit copies of these lists to the accused in his official capacity as returning officer for Selkirk, to enable him to carry on the election. This the Clerk of the Crown in Chancery did.

On a poll being granted, it became the duty of the accused under section 41 to furnish one copy of this list to each deputy, he having first certified it as required by sub-section (*c*) of the

last named section. This copy was furnished as the basis of the election in each particular poll. It was this list which determined who should be entitled to vote.

Persons whose names were found thereon were entitled to a ballot, otherwise not. This list was supplied by the Clerk of the Crown in Chancery to the returning officer for this exact purpose. Its particular identity may not have been established when it left his hand, but one list, undetermined if you will, was supplied as the list to be used, as the basis of the poll. Its identity became certain at the moment the returning officer selected it as the list to send and which he in fact did send to his deputy.

Before forwarding the list the accused scored out certain names. His intent in so doing, his justification for the act in fact, is a question for the jury. Was it a voters' list within the meaning of section 503 at the time the erasures were made? That to my mind is the sole question for this Court to determine.

Counsel for the accused admits that, if the certificate of the returning officer had been attached to the paper at the time the changes were made, it was a list within the meaning of the Act; if made before the certificate, he claims otherwise.

To me it seems idle to argue that the time of the change is the determining factor of its character. If this were law it would be open to any designing returning officer to doctor the lists as he pleased, so long as he was careful to do so before he signed the certificate. When charged under section 503 with unlawfully altering, without legal justification or excuse, he would have a complete defence no matter what his motive, could he but shew he made the erasures a moment only before he signed the certificate.

Such a holding would nullify the Act. Parliament, under such a construction, must be deemed solemnly to have legislated for the protection of the original list, safe in the Parliamentary archives, under the lock of the Clerk of the Crown in Chancery, for the protection of the list after certification by the returning officer, yet to have left full opportunity to maliciously alter

these identical lists did the returning officer but stand upon the order of his altering.

If, as was admitted, it was a list from the time of certification, it was in my opinion equally a list, though possibly unidentified, from the time the Clerk of the Crown in Chancery selected it with other copies pursuant to section 21 to send to the accused, to be sent by him to his deputy for the purpose of the election. In any event, and this is all we need consider, it was a list from the time of its selection by the returning officer for use by his deputy. The alterations were therefore made to a list within the meaning of section 503, and the case should not, on this ground, have been withdrawn from the jury.

But the counsel for the accused also argues that the alterations were permitted in law and that the learned trial Judge was, therefore, justified in taking the case from the jury.

He contends there were no polling divisions in the Electoral District of Selkirk, whereby the accused was authorized under section 32 of the Election Act to "sub-divide the electoral district as he deems it expedient" necessitating the arrangement of the lists, which he claims was all that was done.

Section 23 is in part as follows: "When under the laws of the Province there are no polling divisions for the purpose of Provincial elections the returning officer shall, forthwith after receipt of the writ of election, sub-divide the electoral district into as many polling divisions as he deems necessary for the convenience of the electors," etc.

Defendant's counsel's claim that there was no polling division is based on two circumstances: First, the lists of electors forwarded by the Clerk of the Crown in Chancery were headed "registration district" instead of "polling division." In my judgment this objection cannot obtain.

Section 23 in speaking of polling divisions for the purpose of Provincial elections does not speak of polling divisions *eo nomine* but of what are in fact polling divisions regardless of their local legislative designation. Such in fact they were, such

they appeared to be from the voters' lists, and, such being the case, section 23 did not authorize the accused to establish new divisions.

Second, that the local Electoral Division of Springfield, within which poll 3, the poll in question, is situate, was originally divided by the Manitoba Registration Board into nine polling divisions. When the last lists were being prepared, two of the polling divisions (not affecting the part in question) were sub-divided, making eleven polling divisions for the constituency. The local election of 1903 was held on these lists, with Springfield divided into these eleven divisions. In 1904 a proclamation was issued for the revision of these lists. This proclamation recognized the division as divided into eleven polling divisions. Pursuant to this proclamation the lists in question were prepared. It is now argued by counsel for the accused that the local Registration Board alone had power to create polling divisions, that the sub-division was therefore illegal and that there were consequently no polling divisions within the meaning of section 23.

There is, in fact, a member representing this constituency in Parliament. He was elected, as far as this polling division is concerned, by virtue of the list referred to in the evidence. A list was sent by the Clerk of the Crown in Chancery to the accused for the purpose of holding this election in this polling division. That list had been prepared and certified to by the local authorities, in apparent conformity to the local legislation. It had been accepted by the Clerk of the Crown in Chancery as such. The polling divisions by this division created had nothing to do with division No. 3 but they were in fact the divisions used during the last election for the Manitoba Legislature.

It is now argued that the returning officer may disregard these conditions and of his own judgment, under section 23 of the Dominion Elections Act, declare "that under the laws of the Province there are no polling divisions for the purpose of Provincial elections," and then proceed to create divisions and prepare new lists.

I do not think the statute will bear any such construction. To my mind Parliament never intended returning officers, appointed and acting in the heat of an election, to be the final court of appeal and to determine such delicate matters in the absence of the parties and with no provision for their being heard. Such questions can be settled only by the Courts, when all parties will at least have an opportunity of being present. There were polling divisions in fact for the purpose of Provincial elections, and beyond that the returning officer had no authority to inquire. It was not his business to reject that which in fact existed because of supposed illegality in its creation. I am however inclined to the opinion that these polling divisions were such in law as well as in fact.

I would therefore answer the questions stated in the case as follows: In my opinion the learned trial Judge did not properly withdraw the case from the jury, nor did he properly direct a verdict of "not guilty" to be entered.

New trial ordered.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE GRAHAM, E.J.
BEFORE RUSSELL, J.

THE KING v. BRINDLEY.

Common assault—Punishment on summary conviction—Maximum imprisonment for two months—Sentence of sixty days—Possible excess over two months—Habeas corpus—Cr. Code (1892), *sec.* 265—*Revised Cr. Code* (1906), *sec.* 291.

Per GRAHAM, E. J.—A summary conviction imposing a sentence of sixty days is not invalid where the statutory maximum is two months, unless there is a reasonable probability of the sixty days' term being in the particular case more than two months.

Per RUSSELL, J.—It being possible that the prisoner might be detained in gaol for a longer period than if the sentence had been in for one or two months, the conviction is bad and the prisoner entitled to be discharged on habeas corpus.

ARGUED: October 23 and 27, 1906.
DECIDED: October 26 and 27, 1906.

Motion on notice to the prosecutrix, and the stipendiary magistrate of the city of Halifax, under chapter 181, Revised Statutes of Nova Scotia, 1900, entitled "Of securing the Liberty of the Subject," on the return of an order in the nature of a writ of *habeas corpus*, made by Longley, J., for an order that the said Ada Brindley might be discharged out of the custody of the keeper of the city prison, at Halifax, where she was imprisoned on a warrant based on a conviction for common assault, made on October 22nd, 1906, for which she was sentenced by the said stipendiary magistrate to imprisonment for sixty days with hard labour.

The application was made on the ground that section 265 of the Criminal Code only authorized on summary conviction, imprisonment for *two months* with hard labour, *sixty days*

being possibly more than two months. The proceedings before the magistrate were taken under sections 265 and 864 of the Criminal Code.

HALIFAX, October 23 and 27, 1906.

John J. Power, for the prisoner, referred to *Reg.* v. *Gavin*, 30 N.S.R. 162, 1 Can. Cr. Cas. 59; *City of Halifax* v. *Clusen*, 6 R. & G. 521, 63-64 Vict. (D.), ch. 48; Criminal Code, secs. 879 *et seq.*, 900; Nova Scotia Crown Rules 27 to 37 inclusive; and Rev. Stat. N.S. (1900), ch. 155, sec. 25 (2); and ch. 181, sec. 5 (2); *R.* v. *Elwell*, 2 Str. 798; *R.* v. *Bethel*, 5 Mod. 22; *Re Watts*, 5 Can. Cr. Cas. 539.

No one *contra*.

HALIFAX, N.S., October 26, 1906.

GRAHAM, E.J.:—The defendant was convicted on a summary trial of an assault and has been sentenced to imprisonment for the term of *sixty days* with hard labour. The maximum term in the Code is *two months*. The defendant is undergoing imprisonment now upon this sentence. There is no intimation that the defendant has applied to have a case reserved nor is there anything suggested by the defendant's counsel which will interrupt that sentence so that it may have to be served at another time when months are shorter.

I think that the defendant should make out a case which shews that the sixty days' term she has received will exceed the two months' term provided by the statute or at least that there is a reasonable possibility of that result happening. There is in my opinion, no reasonable possibility of the sentence exceeding the statutory period, and therefore, no ground for discharging her.

In *Reg.* v. *Gavin*, 30 N.S.R. 162, 1 Can. Cr. Cas. 59, the application was on a writ of *certiorari* to quash the conviction. There

was a fine with a provision for distress and in default of distress a term of imprisonment for 90 days, the statutory term being three months. In that case it might possibly happen that the term of sentence would turn out to be excessive. But here, where the limit of the sentence is certain and fixed, it having already commenced, and there being no suggestion as to any possible chance of it turning out to be excessive, I think the prisoner should not be discharged.

The application was renewed before Russell, J., on Oct. 26th and 27th, 1906, on the same ground, the same counsel for the prisoner appearing and no opposition being made to the motion.

HALIFAX, N.S., Oct. 27, 1906.

RUSSELL, J.:—I am unable to distinguish this case from the reported case of *The Queen* v. *Gavin*, 30 N.S.R. 162, 1 Can. Cr. Cas. 59, in line with which is the case of *The City of Halifax* v. *Clusen*, 6 R. & G. 521.

If the conviction may so operate as to detain the prisoner in jail for a longer period than she would be detained if the justice had inserted "two months," as the law directs, then it seems to me it must be a bad conviction. Prisoner's counsel has pointed out several ways in which this may happen. Among other things the prisoner, it is suggested, may be let out on a ticket-of-leave, and sent back to finish her sentence on the first of February. Or it is further suggested that I might now refer the matter to the full Court and admit the prisoner to bail in the meantime when the same consequence might follow. There may be some answer to these contentions which would have been made had the Crown seen fit to oppose the motion, but I see no answer and according to present light I must discharge the prisoner which I do with the less reluctance, as it appears that the conviction is merely for a common assault at the instance of a private prosecutor. If the offence had seemed to be serious, I should have preferred to have the case considered by the Court *in banco*.

Prisoner discharged.

Note: *Computation of time—Sixty days or two months—Revised Cr. Code* 291.

Of the conflicting decisions reported above, that of Graham, E.J., in favour of the conviction being upheld, is preferred.

The two cases relied upon do not bear directly upon the point at issue in this case. In the *Gavin* case counsel's admission seems to have left the precise question unargued as to the effect of a ninety day sentence under a three months' limit. In the case of *Halifax* v. *Clusen*, the Court had to decide whether a by-law which purported to authorize three months' imprisonment could be said to authorize a term in excess of ninety days, and it was held that it could and was therefore invalid although it is obvious that a certain three months' term including February does not exceed ninety days. If, conversely, it is to be presumed that ninety days is less than three months, does it not follow that sixty days should be presumed to be less than two months?

In *City of Halifax* v. *Clusen* (1886), 18 N.S.R. (6 R. & G.) 521, the conviction was for the breach of a city by-law. The enabling statute permitted certain fines to be imposed for breach of a by-law and imprisonment in default for a term not exceeding ninety days. The conviction attached imposed only twenty days but the by-law under which the conviction was had, provided for imprisonment for any period not exceeding three months. The Supreme Court of Nova Scotia (McDonald, C.J., and McDonald, Smith, and Weatherbe, JJ.,) held that the by-law was void as it provided for an imprisonment in excess of the powers conferred by the charter, The conviction being under the by-law would fall with the by-law.

The Queen v. *Gavin* (1897), 30 N.S.R. 162, 1 Can. Cr. Cas. 59, was a motion to quash a conviction for a first offence under the Canada Temperance Act. It was admitted by counsel for the prosecutor that the conviction was bad because it provided for an imprisonment for 90 days in default of payment of or sufficient distress for the fine imposed, 90 days being possibly more than three calendar months. The argument was that the conviction might be amended but the Court unanimously held that imprisonment was a "penalty" and that as the amending clause was in terms restricted to cases in which no greater "penalty" was imposed than was authorized, there was in con-

Note—*Continued.*

Computation of time—Sixty days or two months—Revised Cr. Code 291.

sequence no power to amend (McDonald, C.J., Townshend, E.J., Graham, E.J., and Henry, J.).

In a New York case under a statute providing for one month's notice of termination of a tenancy at sufferance, a notice given in April, which contains only 30 days, demanding possession "in 30 days from service" of the notice was held a valid month's notice. *People* v. *Ulrich* (N.Y.), 2 Abb. Prac. 28.

[SUPREME COURT OF CANADA.]

BEFORE FITZPATRICK, C.J., AND GIROUARD, DAVIES, IDINGTON, MACLENNAN AND DUFF, JJ.

SAUNDERS v. THE KING;

THE KING v. SAUNDERS (No. 2).

Common betting house—Place for betting—Betting booth—Race-course of incorporated association—Crim. Code, 1892, *secs.* 197, 204—*Revised Crim. Code* (1906), *secs.* 227, 235.

1. A moveable booth used on the race-course of an incorporated racing association for the purpose of making bets is an "office" or "place" used for betting between persons resorting thereto as defined in section 227 of the Revised Criminal Code, and the bookmaker using it is properly convicted of keeping a common betting house.
2. Sub-section 2 of section 235 Revised Criminal Code, which exempts from the provisions of the main section (dealing with the recording or registering in bets, etc.), bets made on the race-course of an incorporated association does not apply to the offence of keeping a common betting house.

The King v. *Saunders*, 12 Can. Cr. Cas. 33, affirmed.

ARGUED: February 19, 1907.
DECIDED: March 13, 1907.

Appeal from a judgment of the Court of Appeal for Ontario, *ante* page 33, also reported in 12 Ont. L.R. 615, affirming the conviction of the appellant by the police magistrate of Toronto for keeping a common betting house.

The appellants were operating as bookmakers at the annual spring meeting of the Ontario Jockey Club, an incorporated association. In a building near the public stand they had a number of booths on castors which they moved about the building or in fine weather on the lawn in front for the purpose of making bets with persons attending the races. Having been convicted of the offence of keeping a common betting house the magistrate at their request, stated a case for the opinion of the Court of Appeal which contained the following:—

"1. That the Ontario Jockey Club is a duly incorporated race association.

"2. That the common betting house herein referred to was opened, kept and used by the defendants during the actual progress of a race meeting.

"3. That the defendants kept a betting booth placed in that part of the grounds of the Ontario Jockey Club specially set apart for betting purposes.

"4. That such betting booth was opened, kept and used by the defendants for the purpose of betting with persons resorting thereto.

"5. That all the defendants were engaged in conducting the business of the said betting booth, which was leased by the defendant Saunders and under his immediate superintendence.

"6. That a very large number of bets were made by the defendants against certain horses winning the different races, with persons resorting to said booth.

"7. That in the enclosure specially set apart by the Ontario Jockey Club for betting purposes as aforesaid there are 36 betting booths, including the one above mentioned, known as two dollar books, which were leased to persons called bookmakers for the purpose of betting as aforesaid.

"8. That the defendants conducted and managed a betting booth as aforesaid during the whole of the race meeting, and the defendant Saunders paid therefor and for the betting privilege the sum of $100 for each day.

"9. That the betting booths in question are of the following dimensions, six feet two inches in length, five feet two inches in width, and four feet seven and one-half inches high, and are equipped for the purpose of carrying on betting therein, and are supplied with castors so that in fine weather they may be moved from under the covered part of the betting section of the grounds to a distance of a few feet from the roof.

"10. The defendants' position was changed daily from booth to booth, there being a daily drawing for position among the bookmakers, but during each day these defendants occupied the same booth, where they made bets with persons resorting thereto.

"The questions submitted are:—

"(*a*). Am I right in holding that a betting booth as aforesaid falls within the terms of section 197 of the Criminal Code as a house, office or other place?

"(*b*). Am I right in holding that the provisions of subsection (2) of section 204 of the Criminal Code do not apply to the offence of which the defendants are found guilty?"

The Court of Appeal having affirmed the conviction the defendants appealed to the Supreme Court of Canada.

OTTAWA, February 19, 1907.

C. H. Ritchie, K.C., and *Godfrey*, for the appellants, contended that a wooden booth such as was used in this case was not an "office" or "place" for making and recording bets, under section 197 of the Criminal Code, 1892 (now section 227); and if it was it was within the exception of section 204 (now 235), being on the course of an incorporated association citing Tremeear's Cr. Code, pp. 146, 152; *Stratford Turf Association* v. *Fitch*, 28 O.R. 579.

Cartwright, K.C., Deputy Attorney-General, for the respondent, referred to *Powell* v. *Kempton Park Racecourse Co.*, [1899] A.C. 143.

OTTAWA, March 13, 1907.

THE CHIEF JUSTICE:—This case comes before us by way of appeal from a judgment of the Court of Appeal for Ontario, which confirmed a conviction by the police magistrate for the City of Toronto on a case reserved for the opinion of that Court.

A statement of the facts will be found in 12 Ontario Law Reports, page 615.

The offence with which the defendants were charged before the police magistrate was, as stated in the reserved case, that of keeping a disorderly house, to wit, a common betting house. Section 197 of the Criminal Code defines a common betting house as "a house, office, or *other place* opened, kept or used for the purpose of betting between persons resorting thereto and the owner, occupier or keeper thereof."

Section 198 enacts that every one is guilty of an indictable offence and liable to one year's imprisonment who keeps a common betting house as hereinbefore defined.

It has been found as a fact by the police magistrate, admitted by all the judges below and not seriously denied by counsel for defendants at the argument here, that the betting booth used by the defendants must be held upon the authorities *Powell* v. *Kempton Park Racecourse Co.*, [1899] A.C. 143, and *Brown* v. *Patch*, [1899] 1 Q.B. 892, to be a *place* within the meaning of section 197. The defendants were convicted by the police magistrate on the ground that to use such a betting booth as was described by the witnesses for the purpose of betting between persons resorting thereto, and the owner, occupier or keeper thereof, is an indictable offence under sections 197 and 198 of the Criminal Code. On a reserved case the conviction was upheld by the Court of Appeal for Ontario, Meredith, J., and Garrow, J., dis-

senting. It was not denied that the defendants used the booths in question for the purpose of betting with all comers, but it was put forward as a defence to the charge that the booths or moveable stands having been erected on the premises of an incorporated racing association to be used for the purpose of making bets during the actual progress of a race meeting brought the defendants within the proviso of section 204.

Section 204 declares every one guilty of an indictable offence, who: "(*a*) Uses or knowingly allows any part of any premises under his control to be used *for the purpose of recording or registering any bet or wager* or selling any pool; or

"(*b*) Keeps, exhibits or employs in any part of any premises under his control any device or apparatus *for the purpose of recording any bet or wager*, etc.; or

"(*c*) Becomes the custodian or depositor of any money * * * wagered; or

"(*d*) Records or registers any bet or wager."

By sub-section 2 of section 204, it is expressly declared that the provisions of the section shall not extend to bets between individuals or to *bets made on the race-course of an incorporated association during the actual progress of a race meeting.* These words were added as an amendment when the Criminal Code was enacted in 1892.

Bets between individuals are not illegal at common law and the provisions of this section do not extend to bets between individuals or to bets made on the race course of an incorporated association during the course of a race meeting. I quite agree that the amendment of 1892 was intended to reserve the race courses of incorporated associations as places where bets might be recorded and registered, and any apparatus or structures used for the more conveniently recording such bets or wagers provided this was done during the actual progress of a race meeting, were exempted from the operation of that section.

But to use a place for the purpose of recording or registering bets or wagers is something entirely different from using a

place for the purpose of betting between persons resorting thereto and the owner or occupier thereof.

Bets between individuals or bets made on the race course of an incorporated association during the actual progress of a race meeting can be recorded in any place used for that purpose, but to keep a place whether within or without the grounds of a racing association for the purpose of betting whether during the progress of a race meeting or not, is an offence under section 197.

In my opinion two distinct and separate statutory offences are created by sections 197 and 204, and that which may be invoked successfully as a defence in one case cannot avail in the other. To keep a place for making bets which may be recorded at that place or elsewhere and to keep a place for recording bets wherever made are distinct and separate acts, each of which has been made an offence and each of which is declared to subject the offenders to a different penalty. The exception created by subsection 2 of section 204 with respect to anything therein, does not apply to those places that are kept for the purpose of betting. I do not understand the rule of construction to be that all the sections of the Code dealing with nuisances are to be read together to see how they can be made to harmonize any more than the sections dealing with offences against the person or against property. Distinct and separate acts are by these sections declared to be common nuisances and the only question to be considered is: Do the facts proved in evidence support the charge as laid in each particular case?

No useful purpose can be served by going over the ground already covered by the Chief Justice of Ontario in the Court of Appeal. I quite agree with him that the intention of Parliament, which can only be gathered from the language it has used, was to exempt from the operation of section 204 betting on race courses controlled by incorporated associations during the actual progress of a race, but not to sanction the existence of betting houses on such race courses at such times and under such circumstances. Section 197 makes no exception; at all times and under all circumstances betting houses are prohibited and it is

not for this Court to introduce into this clause qualifying expressions which the legislature has not chosen to put there.

The appeal is dismissed with costs.

GIROUARD, J. (dissenting):—I concur in the reasons given by Mr. Justice Davies for his dissent.

DAVIES, J.:—While I concur with the judgment of the Court of Appeal in their answer to the first question of the case submitted, that a betting booth such as that described in the case falls within the terms of section 197 of the Criminal Code as "a house, office, room or other place," I am not able to concur with the majority of that Court in holding that the provisions of sub-section 2 of section 204 do not apply to the offences of which the defendants were found guilty so as under the circumstances and conditions to exempt them from liability to conviction.

Mr. Justice Osler concurred with the majority on this point considering himself bound by previous decisions of the same Court, but without, as he himself says, being called upon to consider whether these decisions were sound or not. Apart from him the Court was equally divided.

I concur in the conclusions reached by Garrow and Meredith, JJ., that the conviction should be quashed on the ground that the provisions of sub-section 2 of section 204 must be read as applying to the offence of which the defendants were convicted.

I agree with Garrow, J., when he says:—

> "The proper construction in a word is in my opinion to hold that sections 197, 198, have no application to the case of betting carried on upon the race-course of an incorporated association during the actual progress of a race meeting whether or not such betting takes place within or without doors or in any particular 'house, office, room or other place,' so long as it is within the boundaries of the race-

course and so long as the betting is confined to the races then in progress upon that race course."

The history of the two sections 197 and 198 and of section 204 of the Criminal Code, so far as it seems desirable to know it for the purposes of this argument, is that section 204 formed a part of the criminal law for years before 1892 when the Code was enacted but without the latter words of the exempting subsection on which this controversy turns, namely, betting when "made on the race course of an incorporated association during the actual progress of a race meeting." These words were added to section 204 at the time the Code was enacted and sections 197 and 198 were also then for the first time introduced into our criminal law.

These two new sections 197 and 198 define a common betting house and declare it to be illegal and a disorderly house.

It is a defined place "opened, kept or used for the purpose of betting between persons resorting thereto and the owner, occupier or keeper, or opened, kept or used for the purpose of any money being received or on behalf of any such person as and for the consideration of any bet on any race," etc.

The object and purpose of Parliament in enacting the several sections of the Criminal Code under review was no doubt the suppression of betting and poolselling between professional bookmakers and poolsellers and their patrons. To that end sections 197 and 198 defining and penalizing the keeping of a common betting house *for the purpose* of betting or *for the purpose* of receiving any money by the keeper of such house for or in connection with any bet were no doubt introduced into the Code when it was passed in 1892. To more effectually insure the carrying out of the same objects, section 204 of the then criminal law was retained penalizing the using of any part of any premises under his control by any one for the purpose of recording any bet or wager or for the purpose of becoming the custodian or depositary of any money staked or wagered upon the result of any election, race or trial of skill or endurance, but it

was so retained with an additional and important exemption added. That exemption included three specific kinds of betting even when done by the class of persons struck at in the penalizing parts of the section. First, betting when the bet or stake was payable to the *winner* of any race or game, or to the *owner* of any horse engaged in a lawful race, and not to the bookmaker or poolseller; secondly, betting between individuals. These still remained perfectly lawful. So long as the person struck at (the poolseller or bookmaker using a defined place to carry on his calling) was not a party to the bet or a possible beneficiary of the bet, so long as the practices by or through which such person carried on his calling which Parliament aimed to suppress were not involved, neither the bet or anything incidental to it was prohibited; and, thirdly, introduced for the first time as an exemption, betting "made on the race course of an incorporated association during the actual operation of a race meeting."

This latter exemption covered bookmakers as well as other individuals and left betting with bookmakers and poolsellers using premises under their control to record bets and to receive stakes, legal, when carried on within the limitations specified in the exempting words.

But if the substantive act of using part of any premises to receive deposits or stakes of a bet as well as to record such bet or any number of such single bets were thus permitted when done at the special places, times and on the races specified in the exemption, how can it be contended successfully that any other necessary or ordinary incident or act in the carrying on of the main substantive thing permitted such as holding himself out at a particular place for the purpose of doing the act, continued to be an offence?

It must be conceded that the using of a part of the race premises such as a betting booth or house for the purpose of recording bets and there receiving stakes and deposits or the money representing the bets upon the result of any race when the betting and recording and money received were all done and

happened on the race course of an incorporated association during the actual progress of a race meeting and with reference alone to one of the races at that meeting was permitted by sub-section 2 of section 204. Now what are these limited acts as to time, place and event so permitted and not prohibited but the keeping of a common betting house, on the race course but exclusively for the races being run there.

I think for the purpose of construing the exemption clause the three sections must be read together, and that so far as that exemption clause extends to sanction or allow any act which otherwise would be illegal it must be read as covering that act even if the act is made an offence by both sections.

In my opinion the special privilege or permission conceded by the sub-section to carry on betting in a special place at a special time and with reference to special races, necessarily permitted all acts ordinarily essential to the carrying out of the substantial purpose.

If the amendment made to the exempting sub-section contemporaneously with the introduction of the new sections 197 and 198 penalizing the common betting house did not operate to exempt betting made and recorded at such house or place when confined within the limitations expressed in the amendment then it appears to me to be quite meaningless because all betting made between individuals had already been exempted as also all bets which were payable to the owner of the horse racing.

The only effect of the amendment could be to extend the sanction of the clause to betting at the common betting house made between the keeper of the house and outside parties when erected on the race grounds and which betting was confined within the special limitations expressed in the amendment.

Keeping a house or place for the purpose of betting between persons who resort thither to bet with the keeper of such house or place is an indictable offence within section 197 of the Code, but it is not such an offence when it is kept on the grounds of an incorporated race association and the sole and exclusive purpose for

which it is kept is for the special classes of betting defined and limited by the sub-section of 204.

I would, therefore, allow the appeal and answer the first question of the case submitted in the affirmative and the second in the negative.

IDINGTON, MACLENNAN and DUFF, JJ., agreed with the Chief Justice.

Appeal dismissed.

Note: *Betting and pool selling—Race track betting—Revised Cr. Code sec.* 235.

The general provisions of sec. 235 are directed against the use, whether continuous or casual, of premises either for registering bets or pool selling upon horse races, elections and trials of skill, and they also, with certain qualifications, prohibit the holding of stakes or recording of wagers upon the like events.

Sub-sections (*a*) and (*b*) apply only to the person having the premises or a part of any premises under his control. That person must not himself use his premises for the purpose of registering bets of the nature specified nor knowingly allow any other person to so use the premises (sub-sec. *a*). The next sub-sec. (*b*) contemplates a condition of affairs which might or might not, according to circumstances, constitute a user of the premises for the purpose of recording bets. It makes it an offence for the person in charge of premises to keep exhibit or employ a bet-recording apparatus thereon if the betting be upon the result of an election or a race or contest of skill or endurance. This subsection would make the proprietor of the premises liable if he allows another person to place a bet-recording apparatus on the premises for public use although the person in charge of the premises had nothing to do with its operation and received no rental or share of profits.

Sub-sections (*c*) and (*d*) are not restricted to the proprietors of premises as are sub-sections (*a*) and (*b*) but have a general application to stake-holders, pool-sellers and bet-recorders where the result upon which the wager turns is within the scope of the section.

While the typographical arrangement of sec. 235 of the Re-

Note—*Continued.*

Betting and pool selling—Race track betting—Revised Cr. Code sec. 235.

vised Code and of the former sec. 204 of the Criminal Code of 1892 is not of the best to shew the association of words "upon the result of any political or municipal election, of any race, of any contest or trial of skill or endurance of man or beast," a reference to the Lotteries and Betting Act, R.S.C. 1886, ch. 159, from which these Code sections were taken, seems to make it plain that the words last quoted apply not to sub-section (*d*) alone but to all the sub-sections (*a*), (*b*), (*c*) and (*d*), which precede the quoted words. If such be the case then the Code offence of being the custodian of money staked applies only where the staking is upon the result of an election, race or contest as before set forth.

The exceptions to these general provisions are stated in paragraph (2). The first applies particularly to paragraph (*c*) as to custodians. The custodian of money to be paid to the winner shall be exempt from its penalties if the race, sport, game or exercise which was the subject of the bet is a lawful one but not otherwise. The custodian of money to be paid to the owner of a horse engaged in a race shall be exempt if the race was a lawful one and not otherwise. The separate mention of the winner and the owner would indicate that as to horse races, the owner, who did not ride or drive his own horse, would not be a "winner" of a lawful race, and consequently required special mention to avoid the penalties of the section. Neither should the section apply to "bets between individuals." The latter phrase seems to have been intended to include only what may be termed casual bets—the bets of persons not engaged in betting as a pursuit and not tendering bets to the general public. In such cases the recording of the bet, the becoming depository thereof, and allowing the use of premises for the purpose of recording the bet, are all permissible.

A trotting match for fifty pounds between two horses driven in harness in sleighs on the ice was held to be a legal race within previous statutes. *Fulton* v. *James*, 5 U.C.C.P. 182.

And where two persons stake money on a bet between themselves on the result of a boat race, the custodian is not liable because of the exemption above stated.

Next comes the exception which was specially in question in the *Saunders Case* reported above. The provisions of the section

Note—*Continued.*

Betting and pool selling—Race track betting—Revised Cr. Code sec. 235.

shall not extend to "bets made on the race-course of any incorporated association during the actual progress of a race meeting." It was consequently held that an agreement for the sale of betting and gaming privileges at a race meeting by an incorporated association who were the lesseees of an incorporated association owning the race course, was legal. *Stratford Turf Association* v. *Fitch* (1897) 28 O.R. 579. If the sale of the betting privileges be taken as a contract to permit the keeping of a common gaming house by operating bookmakers' booths in violation of the law as declared by the Supreme Court of Canada, the decision in *Stratford Turf Association* v. *Fitch* must now be considered as overruled by *Saunders* v. *The King*, above reported.

It yet remains to be decided whether the betting operations known as "bookmaking" can legally be carried on by professional gamblers at a race track during the races gambled upon, if the "booth" is dispensed with and the "bookmaker" keeps moving in the crowd displaying a card containing the odds he offers and recording his bets in a memorandum book.

[COURT OF KING'S BENCH, QUEBEC.]

BEFORE SIR ALEXANDER LACOSTE, C.J., BLANCHET, HALL, OUIMET AND TRENHOLME, JJ.

GUILLET v. THE KING.

Theft—Part owner—Person having special interest—Theft by minor against tutor—Fraudulent conversion by minor of chattel intrusted to him by his guardian—Cr. Code, secs. 305, 311—*Revised Cr. Code* (1906), *secs.* 347, 352.

1. A minor intrusted by his tutor or judicial guardian with chattel property of which he is part owner, who fraudulently converts it to his own use, with intent to deprive his tutor of it, is guilty of theft.

QUEBEC, May 14, 1904.

A. Corriveau, for the appellant.
Jas. Dunbar, K.C., and *A. Malouin,* K.C., for the Crown.

The judgment of the Court was delivered by

HALL, J.:—This is an appeal from a verdict and sentence under the following circumstances: The accused Guillet is one of two minors to whom one Flamand, the private prosecutor, had been appointed tutor. Under the pretence that he wished to engage in business as a carter and endeavour to earn his own livelihood, the accused induced his tutor to purchase and intrust to him a horse, harness and waggon. Although specially warned by his tutor not to do so, Guillet, acting under the influence of the other prisoner Thibault, made an exchange of the horse and attempted to sell the waggon. The tutor prosecuted them both for larceny under the provisions of articles 305 and 311 of the Criminal Code. The trial took place before Mr. Justice Bossé, at the last term of the Court of King's Bench, Crown Side, at Quebec. The facts were clearly proved. Indeed the prisoners made no attempt to controvert the evidence of the Crown, but relied on the legal objection that the accused Guillet could not be guilty of larceny for the disposal of property of which he was the owner, or at all events the part owner.

Mr. Justice Bossé instructed the jury that the offence charged against the prisoner Guillet, if they found him guilty of it, was covered by the text of our law as to conversion of property really belonging to the accused, but in which another person had a special property or interest which entitled him to the legal control of it. Under this instruction the jury rendered a verdict of guilty against both prisoners and the present appeal is for the purpose of obtaining from the full Bench an expression of opinion as to the instruction given in the case to the jury by the learned trial judge.

It appears plain to me that the instruction given was in accordance with the law, as applied to the facts of this case.

Although the horse may be said to have belonged to the estate of which the accused Guillet was a half owner, yet the administration and legal control of it remained, during Guillet's minority, in the hands of his tutor, who was bound by law to render an account of it, not only to Guillet himself, but to his co-heir.

As to the latter, the tutor's representation that he intrusted part of the value of the estate to one of the minors who had fraudulently disposed of it, would not be accepted as a valid accounting, and I am inclined to think that the accused himself would have a legal recourse against the tutor for his share of the value of the property thus injudiciously intrusted to him during his minority.

The minor has his recourse, after majority, against transactions entered into by him during minority, in which he has suffered lesion. It is contended that this would apply to his tutor whom he had induced to intrust him with his property, but it appears to me that it would apply a fortiori to the one specially appointed by law to exercise, in regard to the minor's property, that discretion which it is legally declared the minor does not himself possess. It is also contended that the minor's declaration in this case of his intention to become a carter and to earn his living by that occupation, gives validity to his transactions, inasmuch as a carter may be held to be a trader and hence not relievable, under 1005 C.C., from contracts made by him for the purposes of his business. This, I think, would apply to third persons and would not relieve the minor himself. But, at all events, this was a question of fact for the jury and not one of law for the judge. Certainly a jury would not convict a prisoner of larceny unless satisfied of a fraudulent intent on his part and that intent would be determined by the special facts of the case. One can conceive a minor engaged in trade making a transaction which, though it turned out disastrously, was entered into in good faith and no charge of larceny could be maintained, but in the present case the jury with all the facts before them brought in an unqualified verdict of guilty. This, it appears to me, settles definitely the question of the prisoner's

good or bad faith, and only leaves to us, as a Court of Appeal, to deal with the validity of the trial judge's instructions upon the question of law as now settled by our Code; and I find no error in his interpretation or declaration of that law, and I am of opinion therefore to dismiss the appeal and confirm the conviction.

In *R.* v. *Webster*, Leigh & Cave, C. C. R. 77, it was held: "If a part owner of property steals it from A. in whose sole custody it is, and who is solely responsible for its safety *and has to account for it*, he is guilty of larceny." *R.* v. *McDonald*, 15 Q.B.D. 323.

Am. & Eng. Ency. of Law, Vol. 3, p. 734, Vo. Bailment, note.

"Where the personal estate of a testator was to remain in the hands of a residuary legatee, with the understanding that he would pay the legacies to his sisters, which would not become due until several years afterwards, but which he neglected to pay, it was held that the residuary legatee was the bailee of the executor and answerable to him for the goods if they should be required of him in order to pay the legacies."

Appeal dismissed.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE TOWNSHEND, RUSSELL AND LONGLEY, JJ.

THE KING v. SNELGROVE.

Depositions as evidence—Preliminary enquiry—Death of deponent before trial of case—Accused not represented by counsel on preliminary enquiry—Interpretation of Code—Cr. Code (1892), *secs.* 7, 687—*Revised Cr. Code* (1906), *secs.* 16, 999.

1. A deposition upon a preliminary enquiry cannot be read as evidence in the event of the deponent's death unless the accused was represented by counsel or solicitor when the deposition was taken.

2. The Criminal Code supersedes the common law procedure as to the conditions upon which a deposition upon a preliminary examination can be used upon the trial in case of the deponent's death.

3. The Criminal Code should be construed as complete and exhaustive as to matters of procedure with which it deals.

ARGUED: April 14, 1906.
DECIDED: May 25, 1906.

The following case was stated by Meagher, J., pursuant to an order of the Court in that behalf:—

"The accused was tried and convicted before me upon an indictment charging him with having unlawfully assaulted Johanna Stelka, a woman who was not his wife, with intent then and there to have carnal knowledge of her without her consent.

"The prosecutrix was examined as a witness on the preliminary investigation before the magistrate and her deposition was taken and reduced to writing by him and signed by her; all in the presence of the accused.

"It was proved that in the interval between the taking of her deposition as above and the time of the trial before me, the house of the prosecutrix was destroyed by fire and she and her husband and children lost their lives thereby.

"The deposition of the prosecutrix clearly and distinctly proved the offence charged. She was not cross-examined by the accused nor by anyone on his behalf before the committing magistrate, but the accused had an opportunity of cross examining her if he so desired, upon that occasion.

"All the preliminary steps called for by the statute and the common law as well in respect to the signing and the taking of her deposition was proved to have been complied with, and there was sufficient proof of the regularity of the entire proceedings and of her deposition in every respect, and also of her subsequent death, to require it to be received in evidence, subject to this that it was shewn that the accused was not represented by counsel or solicitor upon the preliminary hearing and, therefore, it was contended that in the light of the late amendment

to the Code her deposition was not admissible. I received it subject to this objection and the question submitted to the Court for consideration is whether I ought to have received her deposition notwithstanding that counsel for the accused was not present when the deposition was taken.

"If I should not have received it the conviction ought to be quashed as there was no other proof of guilt."

HALIFAX, April 14, 1906.

J. J. Ritchie, K.C., for the prisoner.
A. Drysdale, K.C. (A.-G.) for the Crown.

HALIFAX, May 25, 1906.

The judgment of the Court was delivered by

RUSSELL, J.:—In the absence of any decision of binding authority I think this Court should hold that the Criminal Code of 1892 was intended to make complete and exhaustive provision as to the subjects with which it deals, in so far at all events as its provisions relate to procedure. It is explicitly called a code by the first section of the chapter in which it is embodied and its utility as a code will be greatly impaired if it cannot be so considered. I think that all the remarks of Lord Herschell on this aspect of the *Vagliano Case*, [1891] 1 A.C., at p. 144, apply with equal force to the proposition contended for here, although this application may not be precisely the same as in that case.

Section 7 of the Code which expressly makes common law justifications and excuses applicable to charges under the Act, implies that, in the absence of such a provision, the common law was meant to be superseded by the Act or else expressly embodied in it in the terms of a statute. For this reason I am of opinion that section 687 of the Code provides exhaustively for the cases in which and the conditions under which the depositions taken on the preliminary examination can be used on the trial in the event of the deponent's decease, and that the common law pro-

cedure as to this matter has been superseded. If the section had, in the first instance, been enacted in its present form the contention of the defendant as to its proper construction might have been open to some doubt, but the comparison of the original with the present form makes it very obvious that the intention of Parliament was the same as that expressed by the Minister of Justice in his explanation of the amendment.

As the accused was not assisted by counsel when the examination was taken, I think that the deposition could not properly be received in evidence, and as this is the only possible evidence against the defendant there would be nothing gained by requiring another trial of his case.

Conviction quashed.

Note: *Depositions as evidence—Death, illness or absence of witness who gave evidence on preliminary enquiry—Revised Cr. Code sec.* 999.

The present sec. 999 was formerly sec. 687 of the Code of 1892 as amended by the Code Amendment Act, of 1900. Before the amendment then made the section provided that the deposition might be used if it were proved that it was taken in the presence of the person accused "and that *he,* his counsel or solicitor, had a full opportunity of cross-examining," etc. The word "he" was purposely left out by the amendment. In the debate upon this amendment the Hon. David Mills, then Minister of Justice, said:—"It sometimes happens that an ill-informed man is without counsel before a magistrate, and evidence is taken and he is incapable of cross-examining the party. He is unrepresented by counsel. The witness who appeared before him may have left the country before the trial and may not be present at the trial. The evidence is frequently not well taken, and it may be very different from what it would have been if the witness had been cross-examined. It is, nevertheless, used against him without any opportunity of bringing out those facts which might have completely altered the complexion of the evidence had he been subjected to cross-examination; so where there is no cross-examination I think it is better that the evidence should not be produced." Senate Debates, 1899, p. 554.

Where the cross-examination of a witness for the prosecution

Note—*Continued.*

Depositions as evidence—Death, illness or absence of witness who gave evidence on preliminary enquiry—Revised Cr. Code sec. 999.

upon a preliminary enquiry is interrupted by the illness of the witness, and the magistrate, in the absence of the accused and of his counsel, afterwards obtains the witness' signature to the depositions, but neither the witness nor the prisoner's counsel reattends the enquiry to complete the cross-examination, there has been no full opportunity to cross-examine so as to admit such depositions in evidence at the trial upon proof of the continued illness of the witness. *The King* v. *Trevane*, 6 Can. Cr. Cas. 124, 4 O.L.R. 475.

[SUPREME COURT OF THE NORTH-WEST TERRITORIES.]

BEFORE HARVEY, J.

OLSON v. CAMERON.

Summary conviction—Appeal—Notice of appeal—No substitutional service permitted—Revised Cr. Code (1906), *sec.* 751.

1. A notice of appeal from a summary conviction (Revised Cr. Code sec. 751) cannot be served substitutionally on the respondent by mailing it to his last known address or leaving it at his last known place of abode.

EDMONTON, February 12, 1907.

HARVEY, J.:—This is an appeal from a magistrate's order for the payment of money made under the Masters & Servants Ordinance, the procedure applicable, being under the terms of the Magistrate's Ordinance, the procedure provided by the Criminal Code for appeals from summary convictions.

On behalf of the appellant it is admitted that personal service of a copy of the notice of appeal had not been effected

on the respondent, but that on the contrary it had been impossible to effect such service as the respondent could not be found, but that a copy of the notice had been sent by registered mail to the respondent, addressed to Edmonton and another addressed to Winnipeg, and that a copy had been served on his advocate, and another on a grown person at the last known place of abode of the respondent, which is a boarding house.

It is provided by par. (*b*) of sec. 880 of the Code, as enacted by sec. 3 of 4-5 Ed. VII. (sec. 750 of the new revision, R.S.C. (1906)), that: "The appellant shall give notice of his intention to appeal, by filing in the office of the clerk of the Court appealed to, and serving the respondent with a copy thereof, a notice in writing ..... within ten days after the conviction complained of, etc."

It is urged that if personal service is necessary it may work a great hardship, and the party aggrieved may be deprived entirely of his right of appeal by the proposed respondent keeping out of the way. The same argument of hardship was made to me with reference to several appeals that came up before me several months after the Act had been amended to its present terms, but before the provisions of the amendment had become known to the public, in which appeals the provisions of the law as theretofore existing had been complied with, but the new conditions, not being known through no fault of the appellants, had not been observed. The argument in that case of course could not prevail, because although the hardship was undoubted, it was a matter entirely within the province of parliament, which had not seen fit to give any notice to the public of the change in the law by deferring the time of its coming into effect. In the present case the legislature has the same right to create a hardship, and the Court has no right to legislate to prevent it. When however, more than one interpretation can be given, the effect of a particular interpretation is a matter for consideration in trying to arrive at the intention of the legislation.

In Seager's Magistrate's Manual, at p. 70, it is said with reference to notice of appeal from convictions that, "service by leaving the notice at the place of residence with some grown up person residing there is sufficient," and *R.* v. *N. R. of Yorkshire*, 7 Q.B., 154, is given as the authority for the proposition, but as far as I can see, this case is not an authority for any such proposition.

The Act in question required notice to be given to, "the surveyor or surveyors *or* to such justice or other person by whose act such person shall think himself aggrieved." The surveyor who laid the complaint was personally served, and a notice was left at the dwelling house of each justice. The sessions refused to hear the appeal on the ground that the justices were not served personally. No reasons are given for the judgment of the Court on application for mandamus, the judgment which was delivered by Lord Denman, C. J., being as follows: "The ruling of the sessions in this case certainly cannot be supported." Inasmuch as no argument of counsel for the application is reported, it seems to me reasonable to suppose that the Court may have been of opinion that personal service on the surveyor was sufficient. I can see no reason why service of any kind on the justices was necessary.

There are cases however supporting the view that personal service is not necessary in all cases when it is not expressly required. In *Re Solicitor*, 14 Ch. D., 153, Jessel, M.R., held that notice of motion for a writ of attachment could be served by leaving it at the place of residence of the respondent which he states was the ordinary way before the Judicature Acts. In *Ward* v. *Vance*, 3 P.R. (Ont.), 130, the manner of service is considered and many of the authorities are referred to. It seems clear however that even if personal service were not necessary, on the authority of such cases as *Lewis* v. *Burton*, 7 C.B., 102 and *Price* v. *Thomas*, 11 C.B., 543, service as effected here would not be good service, and though it is unnecessary to decide the point definitely. I am of opinion that personal service is

intended by the section in question here and for several reasons, first, because by sections 562 and 843, (now 658 and 711), provision is made for substitutional service of the summons when personal service cannot be effected, indicating the necessity for such provision, if personal service is to be dispensed with; and secondly, because the former provision, which was repealed when the present provision was enacted, authorized a substitutional or alternative service on the justices who tried the case which has now been taken away.

Again the terms are changed, from the old expression that, "notice shall be given to" to the present expression which states how notice shall be given which includes "serving" the respondent. The former expression with slight modifications in some cases is the expression in most of the cases where other than personal service was allowed. The nature of the appeal itself is another reason for coming to the same conclusion. The appeal does not belong to the party convicted or against whom an order is made as of right, and if he is given an appeal he must take it with such restrictions as are imposed, and the Court cannot remove any such restrictions. The appeal moreover is not an appeal in the ordinary sense, but is in reality a new trial, and if the appellant complies with the conditions imposed he puts the whole matter in issue again, and the party who had judgment in his favour has it taken away from him without a tittle of evidence of its invalidity, and he must then start anew and prove his case again. If the Court, as in any ordinary application of which notice should be given, could require the party moving to prove his right to obtain what he asks for, it would not allow an injustice to be done even if by any chance the other party should not be present by reason of failure to have the notice brought to his attention, but in the case of appeals from convictions there is no such safeguard, and if a service be permitted when it is not proved that actual notice has been received, the possible hardship and injury would appear to be equal, if not superior, to what may happen through

the inability of the party aggrieved to effect personal service. There is no necessary dishonesty on the part of a person who has obtained an order or a conviction, in the fact that his whereabouts may not be known to the other party at a particular time. In the present case it is stated that the complainant was not an ordinary resident of the locality where the employment took place, and no doubt, his employment having ceased, he had nothing to detain him there, for it is admitted on behalf of the appellant, that when service was made at his former boarding house it was stated that he had left and it was not known that he would be back. One can see how in such a case as this the necessity of personal service, may put the appellant in a very disadvantageous position, but on the other hand it would be a great hardship to the respondent to permit his judgment to be set aside without a certainty that he had a knowledge of the proceedings. If it were deemed necessary, it would be very easy to provide for other than personal service, by leave of a Judge or otherwise in cases where it seemed reasonable that such should be permitted, but I do not think that such service is now authorized, and leave to enter the appeal must be refused.

Leave refused

[SUPREME COURT OF THE NORTH-WEST TERRITORIES.]

BEFORE SIFTON, C.J., WETMORE, SCOTT, PRENDERGAST, NEWLANDS AND HARVEY, JJ.

THE KING v. WALKER.

Forcible entry of dwelling house—Apprehension of breach of peace—Absence of actual force—Evidence in rebuttal—Improper admission—New trial—Cr. Code secs. 89, 701—*Revised Code* (1906) *secs.* 102—*Canada Evidence Act, R.S.C.* 1906, *sec.* 11.

1. Forcible entry of a dwelling house may consist of an entry made with such threats and shew of force as would, if resisted, cause a breach of the peace, although no actual force was used.

2. On a charge of forcible entry, evidence relating to the title of the occupant is not admissible; and a statement in the cross-examination of the accused denying that he had previously stated that he had sold the land to complainant is not one "relative to the subject matter of the case" (Revised Evidence Act, sec. 11, formerly Cr. Code, sec. 701), but as to a collateral matter, and evidence to contradict his denial was improperly received in reply.

DECIDED: July 18, 1906.

Crown case reserved by HARVEY, J., for the opinion of the Court.

James Short, for the Crown.

W. L. Walsh, K.C., for defendant.

REGINA, July 18, 1906.

SCOTT, J.:—The defendant was tried before HARVEY, J., with a jury at the sittings at Red Deer on 14th and 15th March, 1906, upon the following charge: "That he, the said Dee L. Walker, on the 7th day of February, 1906, at, etc., did unlawfully and forcibly, and in a manner likely to cause reasonable apprehension of a breach of the peace, to wit, in collecting together an unusual number of persons and in making threats, enter into a dwelling house which was then in the peaceable possession of Guy Griffiths."

At the close of the evidence for the Crown, counsel for defendant applied to have the case withdrawn from the jury, on the ground that the evidence, a copy of which accompanies the case, did not disclose the commission of the offence charged. This application was reserved by the trial Judge and subsequently refused by him. The jury returned a verdict of "guilty," and defendant was convicted.

Defendant gave evidence on his own behalf at the trial. During the examination in chief he stated that he had not sold to the complainant his interest in his homestead, upon which he and the complainant Griffiths were then living, and upon which the alleged forcible entry was effected; and, in his cross-examin-

ation, he denied that he had told one McLean that he had done so. At the close of the evidence for the defence, counsel for the Crown called McLean for the purpose of contradicting defendant with reference to that statement. The evidence was objected to, but the objection was overruled.

The questions reserved for the opinion of the Court are:

1. Was the evidence sufficient to sustain the conviction?

2. Was the evidence of McLean as to the statement made by defendant to him properly received?

The charge against the defendant appears to come within sec. 89 of the Criminal Code, which provides that "forcible entry is where a person, whether entitled or not, enters in a manner likely to cause a breach of the peace or reasonable apprehension thereof, on land then in peaceable and actual possession of another," and that every one who forcibly enters land is guilty of an indictable offence.

There was, in my opinion, sufficient evidence upon which to base a conviction for the offence as defined by the section referred to. The evidence for the Crown shews that on the evening preceding the day upon which the entry was made, the defendant went to the dwelling occupied by the complainant, where he then was with his partner, one Baker, and ordered them to go out, stating that if they did not go out, he would throw them out the next morning, and that he had the men there to do it; that the next morning the defendant appeared at the house with 4 other men, and again ordered them out of the house; that he entered the house, and, pushing aside Baker, who stood at or near the door, he and the others who were with him began to remove and did remove the complainant's furniture and property from the house and premises. Complainant and Baker both state that it was the fear that defendant would resort to personal violence if they resisted that prevented their doing so; and in view of the threats made by defendant the previous evening, I cannot but think that they might reasonably have assumed that, if they made any such resistance, a breach of the peace would ensue.

It is alleged in the charge that defendant forcibly entered the premises. That actual force must be used in making the entry does not appear to be a necessary ingredient of the offence as defined by the section referred to. See also Archibald's Criminal Pleading, 23rd ed., p. 1111. It was, however, contended by counsel for defendant that, as it was alleged that the entry was forcibly made, the Crown was bound to prove that it was so made. The only actual force shewn to have been used was the pushing aside of Baker by defendant when he entered the building. I am of the opinion that, as the use of actual force was not essential to constitute the offence, the allegation that it was used might be rejected as surplusage, and that it was not necessary to prove it: see Archibald, p. 304. In this view it is unnecessary to consider whether the act referred to of the defendant constituted actual force.

The objection to the reception of the evidence of McLean in reply was that if defendant had made any statement to the effect that he had sold the land to complainant, it was a statement respecting a collateral matter and one not relevant to the issue. It appears to be settled that upon such a charge as this, evidence relating to the title of the occupant is inadmissible: see *Regina* v. *Cokely*, 13 U.C.R. 521. If, therefore, the Crown had, in the course of the presentation of its case against the defendant, sought to give this statement of the defendant in evidence, it would properly have been rejected; but, as the defendant in the course of his defence introduced evidence relating to the question of title, it may seem unreasonable that the Crown should be precluded from rebutting it. It may be said, however, that the Crown should have objected to any such evidence being received.

Section 701 of the Code provides that, if a witness upon cross-examination as to a former statement made by him relative to the subject matter of the case and inconsistent with his present statement, does not distinctly admit that he made such statement, proof may be given, upon a proper foundation being laid for that purpose, that he did in fact make it.

Now, the subject matter of this case is not the land, nor the complainant's title to it, but merely the entry by defendant upon it. I think, therefore, it cannot be said that this statement of defendant, if made by him, was one relating to the subject matter, or that it was other than a statement respecting a collateral matter.

For the reasons I have stated I am of opinion that the first question submitted should be answered in the affirmative, and the last question in the negative, and that by reason of the answer to the last question the conviction should be quashed and a new trial ordered.

SIFTON, C.J., WETMORE, PRENDERGAST, and NEWLANDS, JJ., concurred.

HARVEY, J. (dissenting):—I concur with the majority of the Court in the view that there is evidence to support the conviction, but am unable to agree with the conclusion that the evidence which was received in contradiction of the testimony of the accused as to his previous statements was inadmissible.

The case appears to me to come within the rule covered by sec. 701 of the Criminal Code, 1892. I cannot bring myself to the conclusion that the expression relative to the subject matter is intended to limit the subjects in which self-contradiction may be permitted to be proved to matters which are part of the issue, and, in my opinion, the statement in question related to the subject matter of the case, and was therefore a subject on which a former contradictory statement might be given in evidence.

It is stated in Phipson on Evidence, at p. 153, that "independent evidence may also be given of the following facts, though they are otherwise irrelevant to the issue," the first of the exceptions specified being that of proving the self-contradiction of a witness under the provisions of the English Common Law Procedure Act, in the same terms as the section of the Code above mentioned. And again at p. 158: "Although witnesses may be contradicted by independent evidence in all matters

relevant to the issue, their credit cannot, except in the cases mentioned ante 153-155, be impeached by contradiction on irrelevant matters."

I have seen no decided case in which the subject is directly considered, but the interpretation of the section as given by Phipson appears to me reasonable, and, in my opinion, it governs the present case.

Order for new trial.

Note: *Forcible entry of dwelling house—Evidence to prove offence—Revised Cr. Code sec.* 102.

The points upon which the onus of proof is upon the prosecution are thus summarized in Archbold's Criminal Pleading, 22nd edition, page 1055, 23rd edition, page 1111.

> The prosecutor must prove:—First, that he was seized in fee of the premises in question, or otherwise in lawful possession, at the time of the forcible entry. The prosecutor's title is not part of the issue, and probably need not, for purposes of conviction, be stated with precision. See *R.* v. *Child,* 2 Cox, 102; *R.* v. *Hoar,* 6 M. & Sel., 266; 18 R.R. 368. And proof that he was in the actual occupation of the premises, or in the perception of the rents and profits, is sufficient *primâ facie* evidence of his seisin. See *Lows* v. *Telford,* 1 App. Cas. 414; *Jayne* v. *Price,* 5 Taunt. 326; 15 R.R. 518. This presumption, however, may be rebutted, either by direct evidence of his having a less estate, or by evidence of circumstances from which the jury may presume it. *Jayne* v. *Price, ubi supra.* But it is immaterial whether the estate thus proved be an estate by right or by wrong; for even if the defendant have a right of entry, still his asserting that right "with strong hand, or with multitude of people," is equally an offence within the statute as if he had no right; and this is so even where a landlord forcibly ejects a tenant whose term has expired. *Taunton* v. *Costar,* 7 T.R. 431; 4 R.R. 481. If he was a mere trespasser, apparently the statute does not apply. *Browne* v. *Dawson,* 12 A. & E. 624: *Scott* v. *Brown,* 51 L.T. 747. And the statute, however, does not extend to a case where the party ousted had the bare custody of the premises for the defendant; 1 Hawk. ch.

Note—*Continued.*

Forcible entry of dwelling house—Evidence to prove offence—Revised Cr. Code sec. 102.

64, sec. 32; but it extends to the forcible ouster of one joint tenant, or tenant in common, by another. *Ib.* sec. 33.

It may be considered a good general rule, also, that the statute extends to all hereditaments to which the defendant, if he had a right, might have asserted that right by a peaceable entry.

Secondly, the prosecutor must prove the forcible entry. An entry "with strong hand," or "with multitude of people," is the offence described in the statute. Therefore, an entry by breaking the doors or windows, etc., whether any person be in the house or not, especially if it be a dwelling-house, is a forcible entry within the statute. See 1 Hawk. ch. 64, sec. 26. So, an entry where personal violence is done to the prosecutor, or to any of his family or servants, or to any person or persons keeping the possession for him (*Id.* sec. 26), or even where is is accompanied with such threats of personal violence (either actual, or to be implied from the actions of the defendant, or from his being unusually armed or attended, or the like), as were likely to intimidate the prosecutor or his family, etc., and to deter them from defending their possession (*Id.* secs. 20, 21, 27: *Milner* v. *Maclean*, 2 C. & P. 17), is a forcible entry within the statute.

But an entry by an open window, or by opening the door with a key, or by mere trick or artifice, such as by enticing the owner out and then shutting the door upon him, or the like, without further violence; Com. Dig. Forc. Ent. (A. 3); 1 Hawk. ch. 64, sec. 26; or if effected by threats to destroy the owner's goods or cattle merely, and not by threats of personal violence, 1 Hawk. ch. 64, sec. 28, is not deemed a forcible entry.

A mere trespass will not support an indictment for forcible entry; there must be such force or shew of force as is calculated to prevent resistance. *R.* v. *Smyth*, 5 C. & P. 201. If, however, whilst the owner is out of his house, the defendant forcibly withhold him from returning to it, and in the meantime send persons to take possession of it peaceably, this is said to be a forcible entry. 1 Hawk. ch. 64, sec. 26. Also, where a party having right, and whose entry is congéable,

Note—*Continued.*

Forcible entry of delivery house—Evidence to prove of fence—Revised Cr. Code sec. 102.

enters or makes claim, and the other party afterwards continues to hold possession by force; this is considered a forcible *entry* in the party so holding; because his estate is defeated by the entry or claim, and his continuance in possession is deemed a new entry. *Id.* secs. 22, 34; Co. Litt. 251.

Where the party entering has in fact no right of entry, all persons in his company, as well as those who do not use violence as those who do, are equally guilty; but if he have a right of entry, then those only who use or threaten violence; 3 Bac. Abr. Forc. Ent. (B.); or who actually abet those who do, are guilty. A wife may be guilty of a forcible entry into the dwelling-house of her husband, and other persons also, if they assist her in the force, although her entry in itself is lawful. *R.* v. *Smyth,* 1 M. & Rob. 155; 5 C. & P. 201.

Thirdly, as to the expulsion; it is necessary to prove the expulsion and that the prosecutor is still kept out of possession, merely for the purpose of obtaining restitution of the premises; 1 Hawk. ch. 64, sec. 41; but it is no part of the offence described by the statute, which mentions a forcible entry merely. No restitution shall be awarded, if the defendant has been permitted to remain quietly in possession for three years, previously to the finding of the indictment. 31 Eliz. ch. 11.

Absence of title in the prosecutor is no defence, the gist of the offence being the force. *R.* v. *Studd,* 14 W.R. 806: *Beddall* v. *Maitland,* 17 Ch.D. 174: cf. *Edwick* v. *Hawkes,* 18 Ch.D. 199.

[SUPREME COURT OF CANADA.]

BEFORE FITZPATRICK, C.J., AND GIROUARD, DAVIES, IDINGTON, MACLENNAN AND DUFF, JJ.

Re PLACIDE RICHARD.

Habeas corpus—Jurisdiction of Supreme Court of Canada—Canada Temperance Act—Conviction—"Criminal case"—Limit of penalty—"Not less than $50."

1. A commitment on conviction for an offence against Part II. of the Canada Temperance Act is a commitment in a criminal case and a Judge of the Supreme Court of Canada has power to issue a writ of *habeas corpus*.

2. Under Part II. of the Canada Temperance Act which enacts that a fine may be imposed of "not less than $50" for a first offence and of "not less than $100" for a second offence, the magistrate cannot impose a fine of more than $50 for a first offence.

3. On application to a Judge of the Supreme Court of Canada for a writ of *habeas corpus* he may refer the same to the full Court which has jurisdiction to hear and dispose of it.

ARGUED: March 19 and 20, 1907.
DECIDED: March 21, 1907.

APPLICATION for a writ of *habeas corpus* referred by Mr. Justice Duff to the Court.

The application for the writ was made on behalf of Placide Richard, who was confined in the common gaol at Dorchester, N.B., on commitment under a conviction for an offence against Part II. of the Canada Temperance Act. The ground on which his discharge was claimed was that for a first offence against the Act a fine of $200 had been imposed while the penalty authorized by the Act was "not less than $50" which, it was contended, meant neither more nor less than $50. Or if the magistrate had authority to impose a greater penalty than $50 he could not go beyond $100, the minimum for a second offence.

OTTAWA, March 19 and 20, 1907.

J. A. Ritchie, who opposed the application, took the preliminary objection that a Judge only could grant a writ of *habeas corpus*. Mr. Justice Duff had no power to refer the case and the Court could not deal with it.

Masters, K.C., and *C. Lionel Hanington* were heard contra.

The Court took time to consider the objection and it was overruled.

Mr. Ritchie also raised the objection that the applicant was

not committed "in a criminal case," which it had to be to empower the Judge to issue the writ. The Court did not wish to hear counsel for the applicant as to this.

The argument then proceeded on the merits.

Masters, K.C., and *Hanington,* in support of the application The expression "not less than 50" as the penalty for a first offence means "$50 and no less" as said by Armour C.J., and held by the Court in *Reg.* v. *Smith,* 16 O.R. 454. The Supreme Court of Nova Scotia in *Reg.* v. *Porter,* 20 N.S.R. 352, has held the same, and the Supreme Court of New Brunswick also in *Reg.* v. *Rose,* 22 N.B.R. 309. In *Stimpson* v. *Pond,* 2 *Curtis Cir. Ct.* 502, Judge Curtis, an associate Judge of the United States Supreme Court, expressed the same view of a similar expression.

If the magistrate has jurisdiction to impose a greater penalty than $50 his discretion must be exercised reasonably and the statute has fixed the limit at the penalty for a second offence, namely, $100. See *Reg.* v. *Smith,* 16 O.R. 454, *per* Falconbridge, J.

J. A. Ritchie, contra. The words "not less than $50" should be construed according to their grammatical sense, which is, $50 or more and the excess is in the discretion of the magistrate. See *Reg.* v. *Cameron* 15 O.R. 115.

OTTAWA, March 21, 1907.

THE CHIEF JUSTICE:—For the course adopted by Mr. Justice Duff under the circumstances explained in his reasons for judgment and of which course the majority of the Court fully approves, there is ample authority in the case of *In re Sproule,* 12 Can. S.C.R. 140.

It is quite impossible to add anything of value to the very learned discussion of the whole subject in that case by three such eminent lawyers as Ritchie, C.J., Strong, C.J., and Taschereau, C.J.

In Mr. Justice Duff's conclusions on the merits, we will also concur and for his reasons.

GIROUARD, J.:—Mr. Justice Duff, to whom an application for *habeas corpus* was made by the petitioner under section 62 of the Supreme Court Act, has referred the same to the full Court. Mr. Ritchie, counsel for the City of Moncton, New Brunswick, from which province the case comes, raised objections that we have no jurisdiction to hear the application and that the jurisdiction is limited to the Judge individually. He admits that a prisoner could go before every Judge separately, but he cannot go to the full Court and get the opinion of all the Judges as forming the Court. Of course, no one can dispute that this Court is a statutory one, but it has never been disputed that it is a Superior Court and as such has jurisdiction over every proceeding in the Court whether sitting as such or in chambers. This rule is not new; it was fully discussed *In re Sproule*, 12 Can. S.C.R. 140, by Ritchie, C.J., Strong and Taschereau, JJ., Fournier and Henry, JJ., dissenting.

Chief Justice Ritchie said:—

> "That this is a matter pertaining to the Court, and one with which it can deal, and not a jurisdiction conferred on a Judge of the Court outside of and independent of the Court, and that the Judge has no independent jurisdiction unconnected therewith, is, I think, very obvious from the fact that he can only act as a Judge of this Court through the instrumentality of the writ of this Court, obedience to which could not be enforced by authority of the Judge but by the Court, which alone could issue an attachment for contempt of the Court in not obeying its process, the contempt being contempt of the process of the Court, not of the fiat of the Judge authorizing its issue, and therefore the impossibility of enforcing obedience to the process of the Court without the assistance of the Court, seems to me to prove, conclusively, that the matter is within the jurisdiction of the Court."

And further on, at page 181, the learned Chief Justice said:—

"The writ of *habeas corpus* is not the writ of a Judge on whose fiat it issues. It is a high prerogative writ which issues out of the Queen's Superior Courts and, in my opinion, is necessarily subject to the control of those Courts not necessarily by way of appeal, but by virtue of the power possessed by the Court over the process of the Court."

Mr. Justice Strong, and Mr. Justice Taschereau, expressed their opinion in the same sense. Therefore if a Judge of this Court had jurisdiction to hear the application, I am of the opinion that the full Court had also.

I agree with Mr. Justice Duff on the merits.

DAVIES J., concurred.

IDINGTON, J., (dissenting) :—In pursuance of the powers given by the Supreme Court Act, respecting *habeas corpus*, my brother, Mr. Justice Duff, made an order upon the keeper of a common goal in Westmoreland, in New Brunswick, to return Placide Richard, with cause of his detention, if any, to him, the Honourable Mr. Justice Duff, in his chambers, at Ottawa, and by the order fixed Saturday, the 16th of March instant, at said chambers, for hearing the application for the discharge of said prisoner. That order has been returned and fully heard before the learned Judge who has referred the matter of the disposal thereof to the full Court.

Objection has been taken, upon the opening of the motion before us, to our right to take up such reference and hear the motion. I understand that a majority of the Court, after consideration, have come to the conclusion that the objection should be overruled.

I am unable to agree with the majority of the Court in regard either to the power to hear this motion, or the expediency of adopting such a practice as enlarging into the full Court any motion which the statute gives a Judge in chambers power to

hear and determine, but fails to provide for being enlarged into the full Court.

Assuming for a moment that, in the absence of any express prohibition, such a course were open to us, I think, with the greatest submission and respect, that its adoption would be, to say the least, highly inexpedient.

Section 83 of the Exchequer Court Act, section 44, subsection 3 of the Canadian Railway Act, and sections 104 and 106 of the Winding-up Act, each confer power upon a single Judge to give leave to appeal to this Court. Other similar powers are given to a single Judge of this Court. I know not where, if we establish in this case a precedent for doing so, we can stop the practice of hearing chamber motions by the full Court.

Those concerned in, and pressing for or opposing such motions, most of which, arising under such statutes as I refer to, are quite as important as this one, will be very astute in suggesting and magnifying the importance of the point to be decided.

We held in the case of *Williams* v. *Grand Trunk Railway Co.*, 36 Can. S.C.R. 321, that no appeal would lie to us from a refusal of a single Judge to give leave to appeal. This was upheld in the Privy Council. But if we can hear this motion by way of acting in an advisory capacity, and we can hear it is no other way, why not in the same way hear any other? If permissible, we might thus overcome the want of an appeal from the single Judge in the cases I have enumerated.

It might be urged, moreover, that as there was no appeal, it would improve matters to have the Judge, who for the time being might be holding chambers, aided in this way.

In the case now in hand, I am happy to think that my brother Duff is, if I might be permitted to say so, quite able to do without the light to be got from the proposed argument before the full Court. Moreover, the prisoner is entitled to his judgment in the matter.

Again there is an appeal given by the statute to the Court from the learned Judge's judgment, in case he refuses the writ or remands the prisoner.

There is much more reason for an anticipatory hearing of the subject matter (of what might well be subject for an appeal), where no appeal exists, than in the case where such relief can be given.

The matter may be summed up in a few words; the statute creating this Court did not give, nor has any amendment thereto given, us the power, either directly or indirectly, to adopt the proceeding about to be entered on. Moreover, such a thing has never been done before, except where the statute expressly empowered the Court to make the order. The statute has, in some cases where Parliament chose to distinguish, given the power either to Judge or Court, as the case may be.

It is said, however, that the case of *Re Sproule*, 12 Can S.C.R. 140, is to be relied on as establishing a precedent in this Court supporting the practice about to be adopted. I am with due respect, utterly unable to comprehend how. I repeat what has been so often said that to constitute the decision in a case a precedent to bind, there must have been something decided thereby necessary to the determination of the case or matter under consideration, and that must be something properly under consideration. All beyond is *obiter dicta*.

If I understand *Re Sproule*, 12 Can. S.C.R. 140, in light of that, all it did decide and all it stands for, as good law, is that this Court has jurisdiction to set aside an order made, or quash a writ improvidently granted, by one of the Judges thereof, and that the order was so made and writ so issued when going beyond what was involved in "an inquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada," as shewn by the facts of that case. I have not had time to read since this motion was launched the ninety pages of the report of *Re Sproule*. I see, however, that the motion there was to quash and nothing more decided on such motion than I have stated. I

agree therewith. I do not think it at all applicable to this case. We have not heard of anything like it in this case. And I have no doubt we will not in this case, hear of anything like it. The decision was given on a substantive motion to quash.

How can a decision, granting a motion to quash, bind this Court to sit in full Court, to hear a motion for discharge?

If there are opinions expressed in the judgment in that case that go the length some of the head notes of the report suggest, I beg respectfully to differ. But I see nothing even there to warrant our sitting to consider the motion now pending.

Section 62 now in question of the Supreme Act, is as follows:—

"Every Judge of the Court shall except in matters arising out of any claim for extradition under any treaty, have concurrent jurisdiction with the Courts or Judges of the several provinces, to issue the writ of *habeas corpus ad subjiciendum*, for the purpose of an inquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada.

"(2) If the Judge refuses the writ or remands the prisoner, an appeal shall lie to the Court."

It, as plainly as language can express it, gives to the Judges of this Court, singly, and only to each of them so sitting singly, and not to the Court "concurrent jurisdiction with the Courts or Judges of the several provinces to issue the writ of *habeas corpus ad subjiciendum*."

But for the second sub-section of the clause it might be fairly arguable, having regard to the past history of the writ of *habeas corpus*, that its return might be made to the Court though issued by a single Judge. The second sub-section giving an appeal seems to destroy any such implication as within the purview of this section.

With every respect for the opinions that may have led to the head-notes I have referred to, I admit that in trying to find the limits of the jurisdiction of this Court, which is only

the creature of a statute, we ought to keep to the plain meaning when we find it so clearly written as expressed above. It confides to the Judge the right to issue the writ, and to determine the result of its issue. If he cannot grant it or release the prisoner he says so, and then appeal clearly lies. If appeal is not given in case of discharge any opinions given by us in relation thereto would be *obiter dicta* and can receive no consideration, for we would be deciding nothing.

In the past history of the writ of *habeas corpus* we find it a moot point whether at common law it could have been issued by a Judge in chambers; that it always could have been issued by the Court and that when, in the troublous times of Charles I., its issue with greater certainty and expedition was found necessary the statute 16 Car. I. ch. 10, was enacted to give the writ, in cases named, to bring the body of any person restrained before the Court of King's Bench or Common Pleas.

It was found necessary to amend this and 31 Can. II. ch. 2, gave power where the commitment was not for treason or felony, plainly and specially expressed in the warrant of commitment, that the prisoner should be brought before the Lord Chancellor, the Lord Keeper of the Great Seal or the Judges or Barons of the Court from which the writ should issue or such other person or persons before whom the writ *should be made returnable.*

Section 3 of that Act made it clear that any of these Judges could in the cases specified hear the motion in vacation as well as in term. I need not follow the next important Act of 56 Geo. III. ch. 100, expanding the remedies of such writ, or later amendments of the law, relative to *habeas corpus.*

This outline of legislation is referred to here to indicate how differently these Acts present the legal functions of Judge and Court from that which section 62 of our Act presents the duties to be done by each of us and this Court, and how when the former are studied historically the cases shew strict adherence to the statutes in giving effect to them.

It is most instructive to trace the history of the legislation

of the subject of *habeas corpus*. Its development shews how careful the Courts and Judges have been, not to arrogate to themselves any power as inherent in any one beyond that expressly given by statute, or coming down as part of the common law.

Every step taken beyond the common law has been rested upon statute. And it seems to me, when we are asked to go beyond that which the statute expressly empowers us in this statutory Court, we are invited to err. There seems to be abundant reason for constituting and separating the respective powers and duties of Judge and Court in the way that section 62 has done.

The moot point of the common law right of a Judge in vacation to grant the writ was finally settled by the *Canadian Prisoners' Case* reported in 9 A. & E. 731.

The writ which, on the facts there and the nature of the charge, had to rest on the common law had been issued in vacation. The return was not heard until term, and then *only by consent of counsel as the report indicates;* and after an exhaustive argument by Sir John Campbell, then Attorney-General, in support of the objection that, at common law a Judge could not in vacation direct the issue of the writ, the Court decided that the practice had *always been* that a Judge could grant the writ in vacation returnable before himself or the Court.

No two of the provinces present, by legislation, indentically the same procedure. The statute giving the Judges or Court of New Brunswick power is chapter 133 of the Consolidated Statutes of New Brunswick (1903). The Judge is entrusted with nearly all the duties created by this Act. In certain cases, specified and provided for, he can refer to the Court. None of these touch what is being done here.

A consideration of this Act, however, shews why the jurisdiction given by section 62 above quoted confers on every Judge of this Court concurrent jurisdiction with the Courts or Judges of the several provinces.

In Ontario the Judge can make the writ returnable to the

Divisional Court. I refer to this to shew that jurisdiction given a Judge or Court differs in each case.

I assume that the word "concurrent" in section 62 must be interpreted distributively; and that this case coming from New Brunswick must be governed by the Act of New Brunswick referred to. The Act in New Brunswick must be that to which we must look for the basis of the concurrent power; a power, however, limited as section 62 expresses. It seems clear to me that the motion should not be heard. Having at the close of the argument on the preliminary objection had the opportunity of considering the same and come to this conclusion, I took no part in the hearing on the merits and take no part in the decision thereof.

MACLENNAN, J.:—I concur in the opinion of my brother Idington, and having heard the argument on the merits I am of opinion that the conviction was right.

DUFF, J.:—Application under section 62 of the Supreme Court Act for *habeas corpus* to procure the discharge from custody of a prisoner convicted of an offence under section 100 of Canada Temperance Act, as amended by section 1 of 4 Edw. VII. ch. 41.

The warrant under which the prisoner is held recites that he was convicted at Moncton, N.B., of the offence of unlawfully keeping intoxicating liquors for sale contrary to the provisions of Part II. of the Canada Temperance Act, for which offence he was condemned to pay a fine of $200 and costs; and that having made default in payment of these sums he was committed to the common gaol of the County of Westmoreland for one month unless they should in the meantime be paid.

The argument on the return of the order *nisi* disclosing a conflict of judicial opinion respecting the construction to be put upon the enactment under which the prisoner was convicted—which had been construed by the Supreme Court of New Bruns-

wick in one sense and by a Divisional Court in Ontario in the opposite sense—it seemed in order to set the question at rest desirable to, and I accordingly did, refer the application to the Court.

On the point raised respecting the jurisdiction of the Court to hear and adjudicate upon the application, I agree with the views expressed by the Chief Justice and Girouard, J.

Two questions arise: First, does section 62 of the Supreme Court Act confer in such a case jurisdiction in *habeas corpus*? In other words, are the proceedings leading to a conviction for such an offence within the meaning of the words "criminal case" used in that section?

This question seems to be now presented for the first time. In *Ex parte MacDonald* (1896), 27 Can. S.C.R. 683, 3 Can. Cr. Cas. 10, an application for an order directing the issue of a writ of *habeas corpus* on behalf of a prisoner convicted under the same enactment, was heard before Girouard, J., and disposed of on its merits. No objection to the jurisdiction was taken and no opinion was expressed upon the point before us. But the point I think is concluded by the language of the Judicial Committee in *Russel* v. *The Queen*, 7 App. Cas. 829, at page 838. Sir Montague Smith, referring to the enactment in question, there says:—

> "Next, their Lordships cannot think that the Temperance Act in question properly belongs to the class of subjects "property and civil rights." It has in its legal aspect an obvious and close similarity to laws which place restrictions on the sale or custody of poisonous drugs, or of dangerously explosive substances. These things as well as intoxicating liquors can, of course, be held as property, but a law placing restrictions on their sale, custody or removal, on the ground that the free sale or use of them is dangerous to public safety, and making it a criminal offence punishable by fine or imprisonment to violate these restrictions, cannot properly be deemed a law in relation to property in the

sense in which those words are used in the 92nd section. What Parliament is dealing with in legislation of this kind is not a matter in relation to property and its rights, but one relating to public order and safety. That is the primary matter dealt with, and though incidentally the free use of things in which men may have property is interfered with, that incidental interference does not alter the character of the law. Upon the same consideration the Act in question cannot be regarded as legislation in relation to civil rights. In however large a sense these words are used, it could not have been intended to prevent the Parliament of Canada from declaring and enacting certain uses of property, and certain acts in relation to property, to be criminal and wrongful. Laws which make it a criminal offence for a man wilfully to set fire to his own house on the ground that such an act endangers the public safety, or to overwork his horse on the ground of cruelty to the animal, though affecting in some sense property and the right of a man to do as he pleases with his own, cannot properly be regarded as legislation in relation to property or to civil rights."

Their Lordships, it is true, abstain from deciding the question whether the competence of Parliament to pass the enactment can be supported on the ground that it was passed in exercise of the exclusive power to legislate respecting the criminal law conferred by section 91 of the British North America Act, 1867. But it seems to me that there is no good ground for holding that—where Parliament under its power to make laws for the peace, order and good government of Canada declares in the interests of public order that certain acts shall be offences punishable by fine or imprisonment—the proceedings by which such laws are enforced are any the less proceedings in a "criminal case" because in enacting them Parliament did not formally profess to be dealing with the criminal law.

The second question is whether in imposing a fine of $200 the convicting magistrate has exceeded the powers conferred by

the statute under the authority of which he acted. The material provision (section 100, amended as above mentioned) is as follows:—

> "100. Every one who, by himself, his clerk, servant or agent, exposes or keeps for sale, or directly or indirectly, on any pretence or by any device, sells or barters, or in consideration of the purchase of any other property, gives to any other person any intoxicating liquor in violation of the second part of this Act, shall, on summary conviction, be liable to a penalty for the first offence of not less than fifty dollars, or imprisonment for a term not exceeding one month, with or without hard labour, and for a second offence to a fine of not less than one hundred dollars, or imprisonment for two months, with or without hard labour, and for the third and every subsequent offence, to imprisonment for a term not exceeding four months, with or without hard labour."

The point to be determined is whether or not this section in conferring the power to impose a penalty of "not less than $50," authorizes the imposition of a penalty greater than $50. I have come to the conclusion that it does not.

The construction of the language is not unattended with difficulty. But on the whole, the reasoning of Armour, C.J., in *Reg.* v. *Smith*, 16 O.R. 454, convinces me that this interpretation—whichwas adopted by the majority of the Court in that case—does no violence to the words used, and is that most consonant with the probable intention of Parliament as one may gather it from the scope and purpose of the enactment as a whole.

The power to impose fines unlimited in amount in respect of the offences created by this Act is clearly a power which, not being conferred expressly, can only be held to be conferred at all if plainly and necessarily implied in the language used. There is, I think, in the section quoted, no such plain and necessary implication. There is nothing in the section or, I think in the Act as a whole, which would justify us in imputing to the words

referred to any meaning other than that which they literally convey, namely, that the penalty imposed shall not be less than the sum mentioned. One may concede that the use of the phrase "not less than $50" is an unhappy way of providing for a penalty of $50 precisely; but beyond that, except in the case of a second offence, no power is given to the magistrate by the terms of the statute; and one cannot presume an intention to authorize the magistrate to inflict any penalty he pleases. The point is compactly put by Curtis, J., in *Stimpson* v. *Pond,* Curtis Cir. Ct. 502, in a passage cited by Armour, C.J., which I quote:—

> "Power to inflict a particular penalty must be conferred by Congress in such terms as will bear a strict construction. The only power expressly given by this Act is to impose a penalty of not less than one hundred dollars. This power may be exhausted by imposing a penalty of just one hundred dollars. The terms of the Act do not authorize the infliction of a penalty greater than one hundred dollars. Is there a safe implication that authority to inflict a greater penalty was intended to be conferred? The objections to this seem to me too strong to be overcome. In the first place, mere implication can hardly ever be safe ground on which to rest a penalty and when penalties of unlimited magnitude are the subjects of the implication, the danger of making it, and the improbability of the implication, are proportionately increased."

Application granted.

[COURT OF KING'S BENCH, MANITOBA.]

BEFORE RICHARDS AND MATHERS, JJ.

JOHNSTON v. O'REILLY.

Summary conviction—Locality of offence—Jurisdiction not appearing on face of proceedings—Certiorari notwithstanding a pending appeal—Cr. Code (1892) *sec.* 887—*Revised Cr. Code sec.* 1122.

1. A magistrate's jurisdiction to make a summary conviction must appear on the face of the proceedings or he will be presumed to have acted without jurisdiction.

2. Certiorari will lie in respect of a magistrate's jurisdiction upon a summary conviction, notwithstanding sec. 1122 of the Revised Criminal Code and the service of a notice of appeal.

ARGUED: June 29, 1906.
DECIDED: November 26, 1906.

Application to quash a conviction for having sold liquor by wholesale to a person whom the accused knew or had reason to believe was selling liquor without a license, contrary to sec. 130 of the Liquor License Act.

The conviction did not shew where the offence had been committed or that it had been committed in Manitoba.

WINNIPEG, June 29, 1906.

A. Haggart, K.C., for respondent shewed cause and cited *Reg.* v. *Starkey*, 7 Man. R. 47; *Reg.* v. *Lynch*, 12 O.R. 378; *Reg.* v. *Scott*, 10 P.R. 517; *Elliott* v. *May*, 11 Man. R. 306; *Reg.* v. *Herrell* (1899), 3 Can. Cr. Cas. 15, 12 Man. R. 198; *Reg.* v. *Kennedy*, 10 Man. R. 338.

H. Ormond, for the applicant cited *Reg.* v. *Young*, 5 O.R. 184a; *Reg.* v. *Grannis*, 5 Man. R. 153.

WINNIPEG, November 26, 1906.

The judgment of the Court was delivered by

MATHERS, J.:—At the hearing we expressed the opinion that the application must succeed on the ground that it did not appear from the conviction that the magistrate had jurisdiction, but at the request of counsel for the magistrate we reserved judgment to permit him to submit additional authorities. From the fact that none have been furnished I infer that he was unable to

find any to support his view. I have since then gone carefully through the papers and proceedings and I see no reason to change the opinion expressed during the argument.

It is a well-known principle that the jurisdiction of an inferior Court must appear on the face of the proceedings or it will be presumed to have acted without jurisdiction.

It appears that the applicant gave notice of appeal from the conviction to the County Court Judge of the judicial division in which the conviction was had, under sec. 235 of the Liquor License Act, but that the Courty Court Judge for some reason not stated refused a summons to shew cause why the conviction should be quashed. The applicant then served notice of appeal to the County Court, but before the appeal was heard applied to this Court for certiorari.

The granting of a writ of certiorari to remove a conviction is generally in the discretion of the Court and the Court will refuse to grant it, if it appears that the grounds alleged in support are more properly the subject of appeal. *Reg.* v. *Herrell* (1899), 3 Can. Cr. Cas. 15, 12 Man. R. 522. The Court in this case having exercised its discretion in favour of the applicant and granted the writ, that question is not now open.

Section 887 of the Code provides that no certiorari shall be granted where there has been an appeal. And serving notice of appeal is appealing within the meaning of that section. *Reg.* v. *Lynch*, 12 O.R. 378. Certiorari can, however, still be maintained notwithstanding notice of appeal has been given upon any ground which impeaches the jurisdiction of the magistrate. *Reg.* v. *Starkey*, 7 Man. R. 43.

In my opinion, the application must be allowed and an order made quashing the conviction.

As there is no misconduct alleged against the magistrate, following the usual rule, there will be no costs.

Conviction quashed.

Note: *Certiorari to remove summary conviction notwithstanding pending appeal—Revised Cr. Code sec.* 1122.

Section 1122 of the Revised Criminal Code is taken from sec. 887 of the Code of 1892, which was taken from R.S.C. 1886, ch. 178, sec. 84.

The section provides that no writ of certiorari shall be allowed to remove any conviction or order had or made before any justice of the peace if the defendant has appealed from such conviction or order to any Court to which an appeal from such conviction or order is authorized by law, or shall be allowed to remove any conviction or order made upon such appeal.

In *R.* v. *Starkey,* 6 Man. R., p. 589, Taylor, C.J., said: "It is not necessary for the applicant to shew what has been done in the matter of the appeal. Even if an appeal is now pending and being proceeded with, his right to a writ of certiorari is not thereby affected. At all events, it is not so unless the question of jurisdiction is the one raised on the appeal."

And in *R.* v. *Starkey,* 7 Man. R. 47, a case in which notice of appeal had been given before applying for the writ of certiorari and abandoned, the same Judge said: "By sec. 84 of the Summary Convictions Act, R.S.C., ch. 178, 'No writ of certiorari shall be allowed to remove any conviction or order had or made before any justice of the peace if the defendant has appealed from such conviction or order to any Court to which an appeal from such conviction or order is authorized by law,' but it seems still open to the defendant to maintain the present proceeding upon any ground which impeaches the jurisdiction of the magistrates." See also *R.* v. *Montgomeryshire,* 15 L.T.N.S. 290; Paley on Convictions, 7th ed., pp. 358, 359.

An appeal is the creature of the statute law and never lies unless given by express terms, but the rule with respect to certiorari is the very reverse; it always lies unless expressly taken away. *R.* v. *Todd,* 1 Russ. & Ches. (N.S.) 66; *R.* v. *Abbott,* Doug. 553.

If the notice of appeal be void for irregularity, certiorari is not taken away. *R.* v. *Caswell* (1873), 33 U.C.Q.B. 303; *R.* v. *Becker* (1891), 20 Ont. R. 676.

Certiorari and not appeal is the appropriate remedy to raise the question of want of jurisdiction, ex. gr., whether proper service has been made and jurisdiction over the person acquired,

Note—*Continued.*

Certiorari to remove summary conviction notwithstanding pending appeal—Revised Cr. Code sec. 1122.

or whether the justice was disqualified through interest. *Re Ruggles* (1902), 5 Can. Cr. Cas. 163 (N.S.).

A statutory provision taking away the right to a certiorari does not deprive the Superior Court of its power to issue the writ to quash a preceding on the ground of want of jurisdiction. *R.* v. *Hoggard* (1870), 30 U.C.Q.B. 152; and when there is a defect in the jurisdiction of justices or inferior courts, the common law right of certiorari should not be refused merely because a new trial might be had by means of an appeal. *Re Ruggles, supra.*

Even where an appeal is pending, a certiorari for want of jurisdiction should not be refused unless the question of jurisdiction is being raised on the appeal. *Re Ruggles, supra.*

And it has been held that after an appeal has been taken from a summary conviction under the Ontario Summary Convictions Act, a certiorari can only be granted in respect of the want of jurisdiction or excess of jurisdiction of the convicting magistrate. *R.* v. *Horning* (1904), 8 Can. Cr. Cas. 268 (Ont.), affirming *Collins* v. *Horning*, 6 Can. Cr. Cas. 514.

The taking of a writ of certiorari is a waiver on the part of the petitioner of his right of appeal. *Denault* v. *Robida* (1894), 8 Can. Cr. Cas. 501 (Que.).

Where an appeal was taken from a summary conviction but lapsed because of the failure of the magistrate to return the conviction, a Superior Court may afterwards issue a certiorari and quash the conviction notwithstanding the abortive appeal and Code sec. 887, upon the ground that the magistrate had deprived the accused of a reasonable opportunity of making their defence and had acted collusively with the prosecutor. In exceptional cases the Court will grant a certiorari although another mode of reviewing the conviction is provided by statute, and this jurisdiction will be exercised where a gross perversion of justice has occurred through the misconduct of the magistrate. *Ex parte Cowan*, 9 Can. Cr. Cas. 454, 36 N.B.R. 503.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE ANGLIN, J., IN CHAMBERS, AND ON APPEAL BEFORE THE DIVISIONAL COURT.

THE KING v. HUDGINS.

Summary conviction—Summons to person charged—Limitation for informations—30 days after offence—Summons after expiry on information laid within the limitation—Prohibition refused—Liquor License Act, R.S.O. 1897, *ch.* 245, *sec.* 95—*Cr. Code* (1892), *sec.* 559—*Revised Cr. Code* (1906) *sec.* 665—*Code forms* 5 *and* 6.

1. Upon taking an information the magistrate is not bound to issue a summons or warrant upon the same day, notwithstanding the words "this day" in the statutory forms, (Revised Cr. Code forms 5 and 6), but may take time to consider whether a case is made out for so doing.

2. Where a statute provides that informations thereunder shall be laid within a fixed number of days after the offence, but makes no limitation as to the summons or other proceedings, the summons calling upon the accused to answer may be issued after the period of limitation upon an information taken within the period.

ARGUED: February 15, March 1 and May 9, 1907.
DECIDED: February 18, March 1 and May 9, 1907,

Motion for prohibition to justices of the peace on the ground of undue delay in issue of a summons for breach of the Liquor License Act. After the notice of motion had been served the justices made a conviction. Counsel agreed that the motion should be considered as a motion asking in the alternative for a certiorari.

The motion was heard before ANGLIN, J., in chambers, on February 15th, 1907.

W. E. Middleton, for the defendant.
J. R. Cartwright, K.C., for the Crown.

TORONTO, February 18, 1907.

ANGLIN, J.:—The Liquor License Act (R.S.O.1897, ch. 245, sec. 95) requires that the information for an offence against its provisions shall be laid within 30 days of the commission of the offence. This was done—the alleged offence having been committed on October 21st, 1906, and the information laid on October 24th. But it is said that the summons to the defendant, though bearing date October 24th, was not in fact issued until January 14th, 1907.

This, Mr. Middleton argues, was contrary to the provisions of sec. 559 of the Criminal Code, which directs that "upon receiving any complaint or information the Justice shall hear and consider the allegations of the complainant, and, if of opinion that a case for so doing is made out, he shall issue a summons."

The learned counsel also calls attention to the form of summons, form E., which reads: "Whereas you have *this day* been charged, etc.." and cites *Rex* v. *Lennox* (1873), 34 U.C.R. 28; *Regina* v. *Humpherey* (1839), 10 A. & E. 335; *Regina* v. *Arkwright* (1848), 12 Q.B. 960, and *Scott* v. *Parker* (1841), 1 Q.B. 809,813.

He argues that the Criminal Code requires that a magistrate shall issue his summons forthwith upon taking an information, and that any undue delay in the issue of the summons would defeat the purpose of the requirement of the Ontario statute that the information should be laid within 30 days after the commission of the offence.

There is no doubt that the Ontario statute contemplates an early trial of offences against its provisions. But sec. 559 of the Criminal Code applies to offences of all kinds. Moreover, it in terms requires the magistrate to "consider the allegations of the complainant," and it is only if he is "of opinion that a case for so doing is made out" that he is directed to issue a summons. That consideration may require time. In most cases the course of duty is plain, and no prolonged consideration is needed. It is therefore to be expected that the form of summons should read as it does to meet the ordinary case. But the presence of the words "this day" in form E., having regard to the language of sec. 559, by no means warrants a construction of that section which would compel the

magistrate in every case in which he takes an information to issue a summons forthwith or not at all.

Apart altogether from the fact that the defendant has been already convicted, I think the motion entirely fails, because nothing has been shewn which would enable me to say that in issuing a summons on January 14th, 1907, for an offence committed on October 21st, 1906, and in respect of which information was laid within three days thereafter, the justice exceeded his jurisdiction.

From this judgment the defendant appealed to the Divisional Court (MULOCK, C.J., MAGEE and CLUTE, JJ.)

TORONTO March 1, 1907.

W. E. Middleton, for the appellant.
J. R. Cartwright, K.C., for the Crown and convicting magistrate.

At the conclusion of the argument the Court affirmed the order refusing prohibition, but ordered that a writ of certiorari should issue to remove the conviction and proceedings into the High Court.

Subsequently the writ of certiorari was issued and served, and an order *nisi* to quash the conviction granted.

On May 9th the motion to make absolute the order *nisi* was heard before a Divisional Court, composed of MEREDITH, C.J., TEETZEL and MAGEE, JJ., when the motion was refused and the order *nisi* discharged

Conviction sustained.

[SUPREME COURT OF THE NORTH-WEST TERRITORIES.]

JUDICIAL DISTRICT OF LETHBRIDGE.

BEFORE HARVEY, J.

THE KING v. HOAGLIN.

Spreading false news—False placard as to foreigners not desired as settlers in Canada—Merchants' "selling out" notice—Alleged reason for selling out—Revised Cr. Code (1906) *sec.* 136.

1. The publication of a placard stating that settlers from the United States are not wanted in Canada is an injury to the public interests and under sec. 136 of the Revised Criminal Code the person wilfully and knowingly publishing such false statement is properly convicted of spreading false news.

ARGUED: July 5, 1907.
DECIDED: July 5, 1907.

Trial upon a charge under sec. 136 of the Revised Criminal Code of spreading false news damaging to the public interest. The following is a copy of the formal charge:—

"George S. Hoaglin, of Taber, in the Province of Alberta, stands charged before the Honourable Horace Harvey one of the Judges of the Supreme Court of the North-West Territories at Lethbridge in the Province of Alberta this 4th day of July, A.D. 1907, (1) For that he the said George S. Hoaglin at Taber aforesaid on or about the 19th day of March, 1907, did wilfully and knowingly publish a false tale, to wit: "Americans not wanted in Canada; investigate before buying land or taking homesteads in this country" by means whereof an injury was likely to be occasioned to a public interest, namely, the immigration of Americans into Canada.

(Sgd.) C. F. P. Conybeare,
Agent for the Attorney-General."

The accused had made copies of the following announcement (Exhibit A.) on store wrapping paper and pasted them up in his store windows. He had also taken a copy to a printing office and ordered 500 posters printed from same.

> "Closing out sale. We have decided to leave Canada. We will now offer our entire stock for sale at the actual wholesale cost. Americans not wanted in Canada. Investigate before buying lands and taking homesteads in this country. Ten thousand dollars worth of new goods arriving. Men's clothing, women's skirts. All kinds of dry goods. Everything will be sold at actual cost. Cash Buyer's Union, Taber, Alberta."

LETHBRIDGE, July 5, 1907.

C. F. P. Conybeare, K.C., for the Attorney-General of the Province of Alberta.

C. F. Harris, for accused.

LETHBRIDGE, July 5, 1907.

HARVEY, J.:—I think the evidence establishes the act covered by sec. 126 of the Code (Revised Code, sec. 136). It is no doubt true that such a charge as this is very uncommon; I have never known of a similar charge, but apparently it is thought advisable to keep the offence covered by the criminal law of the country as incorporated in the Code as it now stands.

I think it sufficiently proved under the Act by the taking of Exhibit A. to the publisher. It is also apparent it was intended to give considerable circulation to it—the printing of 500, which no doubt would have been circulated,—and the circulation which was accomplished by the notices in the window, shew that it was intended to give some publicity to it.

There did not appear to be any particular reason for it except what was hinted at—that a prosecution had taken place

for an infraction of something under the Inland Revenue Law. That might have caused a feeling of irritation which would result in something of this sort being published. The words themselves under certain circumstances, would not amount to an offence. If a newspaper in discussing the public policy of the country stated that it did not think it was in the interest of Canada that citizens of the United States should come in here, I do not think that would be a matter which would be properly dealt with under this section of the Code.

If under proper conditions it was pointed out that people coming in should investigate before buying land or taking homesteads, I do not think it would be a matter that any objection could be taken to. But in this case it is the connection of the circumstances—"We have decided to leave Canada"—it appears to me the reasonable conclusion to be drawn from that statement is that "We are leaving Canada because Americans are not wanted here and we are going to sell out all we have and go away and we will advise all people who are coming in, to investigate before buying lands or taking up homesteads," the innuendo being that if they investigate they will find conditions such as to prevent them investing and taking up homesteads. I think that comes within the provisions of the section, and the evidence shews that anyone who knows anything about the conditions in this country knows that great efforts are being made to induce settlers from the United States, who are commonly known as Americans, to come into Canada.

Consequently, there is no doubt about this being false, and it appears to me that that being the policy of the country, to have such a statement as this published among people who we believe would be affected by it, it would be against the public interest. Evidence was given on that point, too.

It is very common for merchants in trying to sell out old goods, to make statements which perhaps are not altogether in accordance with the facts, such as they are leaving the place and in this case, if that were by itself, no exception could be

taken to it. There is nothing in the notice itself if the words "Americans not wanted, etc.," were left out, that anyone could take exception to. I think I am bound to enter a conviction.

The sentence will be a fine of $200.00 or in default three months' imprisonment.

Accused convicted.

Note: *Spreading false news—Revised Cr. Code sec.* 136.

Section 136 of the Revised Code of 1906, was formerly sec. 126 of the Criminal Code of 1892.

It provides that—"Every one is guilty of an indictable offence and liable to one year's imprisonment who wilfully and knowingly publishes any false news or tale whereby injury or mischief is or is likely to be occasioned to any public interest."

The ancient statute, 3 Ed. 1, ch. 34, enacted as follows.—"Forasmuch as there have been oftentimes found in the country devisers of tales whereby discord, or occasion of discord, hath many times arisen between the King and his people, or great men of the realm, for the damage that hath and may thereof ensue it is commanded, that, from henceforth, none be so hardy to tell or publish any false news or tales, whereby discord or occasion of discord or slander may grow between the King and his people, or the great men of the realm; and he that doth so shall be taken and kept in prison until he hath brought him into the Court which was the first author of the tale."

This statute proceeds on the idea, that, by the common law, as well understood at the time, and enforced by the Courts, the author of the tale was punishable by indictment—as undoubtedly was the propagator of it also—and the statute merely provided a means by which he should be effectually discovered and brought to justice. Bishop on Criminal Law, 5th ed. (1872), par. 473.

In 1778 Alexander Scott was indicted at the Old Bailey "for that he on the 23rd of April last, unlawfully, wickedly, and maliciously did publish false news, whereby discord, or occasion of discord, might grow between our lord the King and his people, or the great men of the realm, by publishing a certain printed paper, containing such false news, which said printed paper is of the tenor following:—'In pursuance of His Majesty's order in council to me directed, these are to give public notice, that war

Note—*Continued.*

Spreading false news—Revised Cr. Code sec. 136.

with France will be proclaimed on Friday next, etc., etc.' '' The defendant was a bill sticker; and it appearing on the trial that he had been imposed upon, and induced to stick up the bills containing the false matter believing it to be true whereas it was a forgery, he was acquitted. There does not seem to have been any doubt that the act with which he was charged was indictable. *Scott's Case,* 5 New Newgate Calendar 284.

The decision in *Hoaglin's Case, supra,* is the first decision reported in Canada under the section of the Criminal Code above quoted.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE BRITTON, J., IN CHAMBERS.

THE KING v. O'GORMAN.

Change of Venue—"Expedient to the ends of justice"—Conditions likely to prejudice the jury—Balance of convenience of witnesses insufficient—Cr. Code (1892) *sec.* 651—*Revised Cr. Code* (1906), *sec.* 884.

1. The balance of convenience as regards the distance which the witnesses would have to travel is not alone a ground for changing the venue in a criminal case.

2. The principal ground for a change of venue under Revised Code sec. 884 is a reasonable probability of partiality and prejudice in the locality from which the jury would be drawn if the venue were not changed.

ARGUED: May 6, 1907.
DECIDED: May 7, 1907.

THIS was a motion to change the venue, under sec. 884 of the Revised Criminal Code, R.S.C. 1906, ch. 146 (sec. 651 of the Criminal Code 1892), from the city of Toronto in the county of York to the city of London in the county of Middlesex, in a criminal case, the offence alleged being conspiracy.

TORONTO, May, 6, 1907.

E. F. B. Johnston, K.C., and *Geo. Wilkie*, for the motion.
G. Lynch-Staunton, K.C., for the Crown, *contra*.

TORONTO, May, 7, 1907.

BRITTON, J.:—The motion is made under sec. 651 of the Criminal Code. Under that section the power of the Court or a Judge is very wide.

It is to be exercised, whenever it appears to the satisfaction of the Court or Judge, that it is expedient to the ends of justice that the trial of the person charged should be held in some county or place other than that in which the offence is supposed to have been committed.

The accused have been indicted for offences supposed to have been committed at Toronto. The indictment was presented to the grand jury here with the consent of the presiding Judge at the assizes. If the accused have not committed these offences at Toronto, they should not be tried here, unless in pursuance of an order specially made so directing.

Upon the assumption that the accused will not be convicted unless the Crown establishes that they did in fact commit one or more of these offences at Toronto, as charged, what is there before me to shew that it is expedient to the ends of justice that the trial should not take place in Toronto.

It is said by Crankshaw (Criminal Code), in his note to this sec. 651: "The principal ground upon which a change of venue has hitherto been granted and upon which the Court or Judge, in the exercise of the discretionary power conferred by this section, will no doubt in future order the place of trial to be changed, is that there is a fair and reasonable probability of partiality and prejudice in the district, county, or place within which the indictment would otherwise be tried." I agree with this.

It is but faintly suggested—if suggested at all—that there is any prejudice, or likely to be any, in Toronto against the accused,

and so far as one can see, certainly no more than in London; and it might be said that there is a probability of more "partiality and prejudice" in London than in Toronto.

The accused have made a strong case for a change of venue, if balance of convenience is to be considered. No doubt, they will be put to much greater expense by having to stand trial at Toronto, if it happens that so many witnesses from London are required at the trial as were called on the preliminary investigation.

This materially touches the question of a fair trial, so far as the accused may be unable to bring to Toronto witnesses that they could get at London, if tried there. It can not be "expedient to the ends of justice" that the accused or any of them should be convicted if there is evidence material, relevant, and competent, which can be obtained to establish their innocence or to meet the case the Crown may make; and if it shall so happen that the accused really need the assistance of the Crown to have necessary and material witnesses in their behalf brought to Toronto, such assistance ought to be and no doubt will be given. There is such ample power in the trial Judge, the accused will, whatever may arise, so far as I can see, have a fair trial.

If matters outside of what occurs in Court are at all likely to influence jurors either prejudically to the accused or otherwise, there is no more chance of that in Toronto than in London.

It was suggested by counsel for the defence, that some other place than London, near to London—say St. Thomas or Woodstock—would not be objected to. It is clear to me, that such a change would be of no benefit to the Crown or accused, and would be attended with much inconvenience, to say nothing of imposing the burden of such a trial upon a county, that is in no way implicated in or connected with the alleged transactions as to which a trial is to be had.

The cases referred to, and others, as I read them, support the conclusion reached, that I should not make the order asked on this application.

As far back as 1762, in *Rex* v. *Harris*, 3 Burr. 1330, Mr. Justice Denison said: at p. 1334 "The place of trial ought not to be altered

from that which is settled and established by the common law, *unless* there shall appear a clear and plain reason for it"; *viz.*, that there cannot be there a fair and impartial trial.

Mr. Justice Wilmot said that the rule "that all causes shall be tried in the county, and by the neighbourhood of the place, where the fact is committed," ought never to be infringed, unless it plainly appears that a fair and impartial trial can not be had in that county."

Regina v. *Ponton* (No. 2),(1899) 18 P.R. 429, 2 Can. Cr. Cas. 147, goes pretty fully into the matter. It is a question of fair trial or not, owing to a condition likely to influence or prejudice the jury.

Motion refused.

Order dismissing motion.

Note: *Change of venue in criminal cases—Revised Cr. Code sec.* 884.

To effect a change of venue, or, more correctly, to change the place of trial, the Court must be specially moved for the purpose. It does not rest with the Crown to select the place for trial by suggestion or otherwise, as it may desire. And the Court will refuse or grant the motion as it may see fit. But it will be granted when there is a reasonable probability that a fair and impartial trial cannot be had in the place where the cause would otherwise be tried. Per Sir Adam Wilson, C.J., in *R.* v. *Carroll* (1880), (the Biddulph murder case), cited in 2 Can. Cr. Cas. at p. 200.

The power to change the venue is purely discretionary and should be used with great caution. *R.* v. *Russell* (1878), Ramsay's cases (Que.) 199. But where the application was made on the part of the accused it was held sufficient to justify the change, that persons might be called on the jury whose opinions might be tainted with prejudice and whom the prisoner could not challenge. Ibid.

A change of venue should not be made in a criminal case whereby the trial would be transferred from the county in which the crime is alleged to have been committed, unless facts are proved, as distinguished from sworn opinions, plainly indicating that a fair and impartial trial cannot be had in that county. *R.* v. *Ponton* (No. 1) (1898), 2 Can. Cr. Cas. 192 (Ont.). A

Note—*Continued.*

Change of venue in criminal cases—Revised Cr. Code sec. 884.

change of venue should not be granted on the ground of popular sympathy with the prisoner and prejudice against the prosecution, where there is nothing to shew that the class of citizens from whom the jury would be drawn are likely to be prejudiced except by those feelings which arise from the nature of the offence and which are common in all counties. Ibid.

But a change of venue may be ordered under this section on the application of the Crown, where at an abortive trial, at which the jury disagreed, a hostile demonstration was made against the judge by a mob assembled in the streets during a short adjournment of the trial. *R.* v. *Ponton* (No. 2) (1899), 2 Can. Cr. Cas. 417. The change is rendered "expedient to the ends of justice" because the conduct of the mob tended to bring the administration of justice into contempt, and because of its possible influence on a jury at the next trial; and this notwithstanding the sworn statements of every juror at the abortive trial that they were in no way intimidated or influenced by the mob demonstration, part of which took place within hearing of the jury during their deliberations. Ibid.

Affidavits from the jurors denying intimidation are properly admissible in evidence on a motion to change the venue where such intimidation is charged. *R.* v. *Ponton* (No. 2) (1899), 2 Can. Cr. Cas. 417.

An order for change of the place of trial is not open to objection on the ground that it makes no provision for the additional expense to which the accused might be put by the change, if the judge making such order was not asked to make an order as to such additional expense, and if it was not shewn to such judge that additional expense would be occasioned. *R.* v. *Coleman* (1898), 2 Can. Cr. Cas. 523.

Where, after a committal for trial for an offence under the Criminal Code, an order is made changing the place of trial to another county, an indictment may be preferred in the latter county not only for the offence for which the accused was committed for trial, but for any other offence disclosed in the depositions taken before the committing justice. Ibid.

In order to obtain a change of venue in a prosecution for de-

Note—*Continued.*

Change of venue in criminal cases—Revised Cr. Code sec. 884.

famatory libel such facts must be shewn as will satisfy the Court that a fair trial cannot be had at the present venue, and it is not sufficient that the applicant's solicitor swears to a belief that a fair trial is impossible there because of the prosecutor's interest in political affairs. The fact that two abortive trials of the cause have already taken place at both of which the jury disagreed, is not of itself a ground for ordering a change of venue. *R.* v. *Nicol* (1900), 4 Can. Cr. Cas. 1 (B.C.).

A change of venue has been granted upon prisoner's solicitor's affidavit that from conversations he had had with the jurors, he was convinced of a strong prejudice against the prisoner. *R.* v. *McEneaney,* 14 Cox, 87; *R.* v. *Walter,* 14 Cox, 579.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE MULOCK, C.J.E.D., ANGLIN AND MAGEE JJ., SITTING AS A DIVISIONAL COURT.

THE KING v. HOLMES.

Police magistrate in Ontario—Jurisdiction — Offences against provincial statutes—Town magistrate acting elsewhere in the county—Liquor License Act (Ont.)—Police Magistrates Act, R.S.O. c. 87.

1. A police magistrate for one town in a county has no jurisdiction to try a charge for an offence against a provincial statute committed in another town having its own police magistrate in the same county, except at the request of the latter or in his illness or absence, notwithstanding the provisions of the statute R.S.O. 1897, ch. 87, sec. 30.

2. When sitting elsewhere than in the town for which he is police magistrate, a magistrate is ex officio a justice of the peace for the whole county, and under sec. 30, of the Police Magistrates' Act, R.S.O. ch. 87, he has jurisdiction in offences against provincial laws to exercise the powers of two justices but not the powers of another police magistrate.

The King v. *Spellman* (1906) 12 Cr. Cas. 99, discussed.

ARGUED: February 27, 1907.
DECIDED: April 19, 1907.

THIS was an application made by the defendant to quash a conviction by William Church, esquire, justice of the peace in and for the county of Essex, and W. B. Beaman, esquire, police magistrate for the town of Essex, convicting the defendant upon an information charging that he "at the town of Amherstburg, in the county of Essex, did not keep the bar-room in his licensed premises closed during prohibited hours as required by sec. 56 of the Liquor License Act, R.S.O. 1897, ch. 245, as amended by 6 Edw. VII., ch. 47, and unlawfully allowed or suffered persons in said bar-room during prohibited hours, namely, on Sunday, the 19th day of August, 1906."

TORONTO, February 27, 1907.

Frank McCarthy, for the defendant.
J. R. Cartwright, K.C., for the Crown.

TORONTO, April 19, 1907.

ANGLIN, J.:—Mr. Beaman does not seem to have intended to act as police magistrate in this case. He signs the conviction and other papers returned as "J.P., Essex Co." It is from the order granting the writ of certiorari that we learn that he is police magistrate for the town of Essex.

Several objections taken by counsel for the defendant to the sufficiency of the evidence upon which the conviction was founded cannot, in our opinion, be sustained. A formidable objection is raised, however, to the jurisdiction of the convicting magistrates.

The offence charged was committed in the town of Amherstburg, where the defendant resides, and for that town there is a police magistrate.

Section 7 of the Act respecting police magistrates (R.S.O., 1897, ch. 87) is in these words: "No justice of the peace shall

admit to bail or discharge a prisoner or adjudicate upon or otherwise act in any case for a town or city where there is a police magistrate, except at the court of general sessions of the peace, or in the case of the illness, absence, or at the request of the police magistrate."

It is admitted that the police magistrate for Amherstburg was not ill or absent, and did not request the convicting justices to act in his stead.

Counsel for the defendant contends that this statutory provision excluded the jurisdiction of the magistrates who tried this case. As to Mr. Church—a justice of the peace for the county of Essex—Mr. Cartwright concedes that the objection is well taken. But he maintains that, as police magistrate for the town of Essex, the jurisdiction of Mr. Beaman extends over the entire county, including the town of Amherstburg, and that as police magistrate Mr. Beaman is not within the prohibition imposed by sec. 7.

Though the language of sec. 7 is not, perhaps, as clear as might have been expected, I think it is sufficiently plain that the words "any case for a town or city" include at least any case arising out of an offence committed in such town or city by offenders found within its limits. This was the view taken by the late Mr. Justice Rose in *Regina* v. *Riley* (1884), 12 P.R. 98. The language of the succeeding section of the statute puts it beyond doubt, I think, that such is the proper construction of sec. 7.

Section 8 is as follows:—"Nothing in the preceding sections contained shall interfere with the jurisdiction of justices of the peace for the county in which a town having no police magistrate is situate over offences committed in the town." Excepting the provision in sec. 7, there is nothing in the preceding sections of the statute which could possibly be deemed to affect the jurisdiction of justices of the peace for the county over offences committed in towns situate within such county.

But Mr. Cartwright maintains that the prohibition of sec. 7 does not apply to Mr. Beaman, because he is in fact a police magistrate, though he is as such *ex officio* a justice for the peace for the entire county (sec. 27), because he is not a justice of the peace by

commission appointing him to that office; and he relies upon the decision of the Court of Appeal in *Hunt qui tam* v. *Shaver* (1885), 22 A. R. 202, and the opinion of Britton, J., a member of the Divisional Court which decided *Rex* v. *Spellman* (1906), 12 Can. Cr. Cas. 99, 13 O.L.R. 43. The learned counsel deems it unimportant that Mr. Beaman did not profess to sit as police magistrate.

In *Hunt qui tam* v. *Shaver* it was held that a police magistrate, though *ex officio* a justice of the peace, is not obliged to make returns to the clerk of the peace of convictions made by him without the limits of the particular city or town for which his commission appoints him as police magistrate. This decision turned upon the special language of what was then sec. 6 of R. S. O. 1887, ch. 77 (now R.S.O. 1897, ch. 94, sec. 6), which was held to confer a personal and individual exemption from the obligation to make such returns upon a police magistrate even when he exercises functions, jurisdiction to perform which depends upon the provision giving him status as an *ex officio* justice of the peace beyond the immediate territory for which he is commissioned as police magistrate.

In *Rex* v. *Spellman* the Court held that the jurisdiction of a police magistrate for the county of Peterboro' was not superseded by the appointment of another police magistrate for that county whose commission did not appoint him "in the place and stead" of the former magistrate. It is contended that Mr. Justice Britton expresses the opinion that a police magistrate for a city or town has jurisdiction as a police magistrate throughout the entire county in which such city or town is situate. If such be the purport of what Mr. Justice Britton has said in this case, his expression of opinion is entirely *obiter*, and with it I am, with great respect, unable to agree.

Section 30 of the statute is as follows:—"A police magistrate, sitting as such, shall have full power to do whatever is authorized by any statute in force in this Province relating to matters within the legislative authority of the Legislature of the Province to be done by two or more justices of the peace; and every police magis-

trate shall have such power while acting anywhere within the county for which he is *ex officio* a justice of the peace."

If the police magistrate for a town or city sits, or may sit as such, at any place in the county within which such town or city is situate, it is manifest that the last clause of this section is entirely unnecessary. The prior portion of the section would in that case confer upon him the powers of two or more justices of the peace wherever he should hold court within the county. It must be because the police magistrate can only sit as such within the limits of the territory for which he is appointed that the second clause of the section is requisite, to enable him, when sitting elsewhere in the county, by virtue of his *ex officio* status as a justice of the peace, to exercise the powers of two or more justices of the peace, though not then sitting as police magistrate. When sitting elsewhere than in the city or town for which he is police magistrate, though not divested of his individuality as a police magistrate, and, in fact, exercising jurisdiction because he is a police magistrate, and therefore *ex officio* a justice of the peace for the county, his powers and jurisdiction are merely those of two or more justices of the peace; and what two or more justices of the peace are not authorized to do he may not do. If a police magistrate for a city or town were empowered to sit as and to exercise the functions and jurisdiction of a police magistrate throughout the entire county in which such city or town is situate, though his commission should purport to appoint him police magistrate for the city or town only, it would in fact make him police magistrate for the county and every part of it. This cannot have been intended, and, I am satisfied, is not the effect of the statutory extension of his jurisdiction as a justice of the peace.

By virtue of secs. 17 and 30, as police magistrate for the town of Essex, Mr. Beaman had jurisdiction over offences committed in any part of the county of Essex for which there is no police magistrate: *Regina* v. *Gully* (1891), 21 O.R. 219. To such cases sec. 7 has no application. In regard to the trial by one police magistrate of offences committed within the territorial jurisdiction of another, *Regina* v. *Gully* is not an authority.

But in the present case Mr. Beaman sat in the town of Essex, for

which he is police magistrate, and, sitting there, it is urged for the Crown, he might exercise his plenary powers as police magistrate in respect of any case brought before him for trial if it originated anywhere within the county of Essex. As police magistrate he had clear and exclusive jurisdiction to try persons charged with having committed offences within the town of Essex, and it may be also, as suggested by Rose, J., in *Regina* v. *Riley*, 12 P.R., at p. 104, to try persons found within the town who are charged before him with having committed offences elsewhere within the county. But here the offence is charged as having been committed in Amherstburg, and the defendant is stated in the information and conviction to be a resident of Amherstburg. It is nowhere suggested that he was found or apprehended in the town of Essex, and that fact, if it would confer jurisdiction on Mr. Beaman (which I gravely doubt) cannot be fairly assumed against the defendant. It should appear on the face of the proceedings. But the fact (which does so appear) that Mr. Beaman purported to act as a justice of the peace, and not as a police magistrate, perhaps indicates that the defendant had not been found or apprehended in the town of Essex. At all events, it seems apparent that the magistrate recognized that his jurisdiction to deal with the case depended upon his *ex officio* status as a justice of the peace for the county. In this, I think, he was well advised. As police magistrate for the town of Essex, apart from his *ex officio* character as justice of the peace for the county, I think he had no jurisdiction to try the charge against the defendant.

Section 35 of the Act respecting police magistrates is in these terms:—"No police magistrate need act in any case arising outside of the limits of the city, town or place for which he is police magistrate, unless he sees fit to do so." This provision implies that in cases arising within the limits of such city, town or place he *is* obliged to act; and, further, that in such cases he has a jurisdiction prior to and exclusive of that of other magistrates, whose jurisdiction is as to such cases limited or suspended. Were this not so, as pointed out by Rose, J., in *Regina* v. *Riley*, 12 P.R. 98, at p. 104, "unseemly squabbling between magistrates having concurrent jurisdiction" would be not merely a possible, but a probable result.

The true intent of sec. 7 of the Act respecting police magistrates is, I think, to vest in the police magistrate for a city or town prior and exclusive jurisdiction over all cases "for the town or city" which are within his cognizance as such magistrate. In such cases other police magistrates in the same county have only the jurisdiction of justices of the peace for the county, and, except in the special circumstances enumerated in sec. 7, that jurisdiction is suspended in favour of the prior jurisdiction of the police magistrate of the town or city where the case is localized: *Rex* v. *Duering* (1901), 2 O.L.R. 593. In my opinion, the only jurisdiction which Mr. Beaman had in this case was that conferred upon him by secs. 27 and 30 of the Act respecting police magistrates, namely, the powers and jurisdiction of a justice of the peace or of two or more justices of the peace for the county of Essex. He may also have had a commission as a justice of the peace. It is not material whether he had or had not. Section 7 of the statute excluding the right of any justice of the peace to "adjudicate or otherwise act in any case for a town or city where there is a police magistrate," was intended to, and did in fact, prohibit both Mr. Beaman and Mr. Church from acting in a case such as this. The conviction should therefore be quashed. There will be the usual order protecting the justices and any officer who may have acted under their authority. If the defendant will undertake not to institute any civil action against the informant, he should have his costs of these proceedings against the informant. Unless he is prepared to give such undertaking, however, there will be no order as to costs.

MAGEE, J. (dissenting):—The facts are fully referred to in the judgment of my brother Anglin.

The main question involved seems to me to be concluded by authority.

In *Hunt qui tam* v. *Shaver*, 22 A.R. 202, it was held that a police magistrate making a conviction while sitting by virtue of being *ex officio* a justice of the peace, was not bound to make a return thereof under R.S.O. 1887, ch. 76, sec. 1 (now R.S.O. 1897, ch. 93, sec. 1), which required "every justice of the peace" to make a return of all

convictions had before him. The majority of the Court expressly held that a police magistrate, when *ex officio* acting as a justice of the peace, "acts not strictly as a justice of the peace, but as a police magistrate, and convictions made by him are made by him in that capacity." That cannot be said to be a declaration not necessary to a decision of the case, although Osler, J.A., also considered that R.S.O. 1887, ch. 77, sec. 6, gave individual exemption to police magistrates, and Maclennan, J.A., refers to the separate provision by ch. 77 for entries by them of convictions before them. The latter does not dissent from the position taken by the other members of the Court.

Then following that case comes *Rex* v. *Spellman*, 13 O.L.R. 43, where the question was whether, in view of sec. 17 of R.S.O. 1897, ch. 87, Mr. Dumble, who was the police magistrate for the city of Peterborough, and had also, as the Court held, a commission as unsalaried police magistrate for the county of Peterborough, could convict for an offence committed in the village of Lakefield, in that county, there being a salaried police magistrate for that county. All the members of the Court were of opinion that the appointment of the unsalaried police magistrate was not revoked by the appointment of the salaried officer. The Chief Justice, with whom Mabee, J., concurred, adds: "And *Hunt qui tam* v. *Shaver*, 22 A.R. 202, declares that 'when Mr. Dumble acts, he acts not strictly as a justice of the peace, but as a police magistrate.'" Britton, J., expressly agreed with the argument for the Crown "that Mr. Dumble, as police magistrate for the city, acting as he did and adjudicating in the case, was within his jurisdiction."

I take it from the reference to *Hunt qui tam* v. *Shaver* that the Chief Justice and Mabee, J., were of the same opinion. But whether it was as police magistrate for the city or for the county that Mr. Dumble in that case had jurisdiction, it seems to me a clear decision that, under sec. 17, the prohibition against a justice of the peace adjudicating upon a case within the district assigned to a salaried police magistrate is limited to justices of the peace, and does not extend to police magistrates. Possibly a distinction might be sought to be drawn between a police magistrate when acting within

the limits of his police magistracy and there having the powers of one, two, or more justices of the peace, and when acting beyond such limits, and being there *ex officio* a justice of the peace, but it could not affect the result of that decision as bearing on the present question. Even within those limits he is *ex officio* a justice of the peace under sec. 27, though he has the power of two or more under sec. 30.

In the present case the offence charged was under sec. 97 of the Liquor License Act, triable by one or more justices of the peace, though sec. 56 contemplates a police magistrate acting. It is as a justice of the peace, or as having the power of two or more, that a police magistrate sits in most cases. It is in a minority of cases that jurisdiction is given by statutes to a police magistrate *eo nomine*. By R.S.O. 1897, ch. 86, sec. 1, the Judges of various courts are *ex officio* justices of the peace also.

Section 7 of R.S.O. 1897, ch. 87, which is invoked against the present conviction, corresponds as to cities and towns to sec. 17, which relates to counties. and must receive the same construction: see also *Regina* v. *Gully*, 21 O.R. 219, and see *R.* v. *McLean*, 3 Can. Crim. Cas. 323. The result of the decisions referred to is that Mr. Beaman, the police magistrate for the town of Essex, was not prohibited from adjudicating upon this case. I have no doubt that in doing so he was acting in a case for the town of Amherstburg: see *Rex* v. *Duering*, 2 O.L.R. 593, and *Regina* v. *Riley*, 12 P.R. 98.

Then, if he had jurisdiction, I do not think it avoids his decision that he had with him a justice of the peace who had no right under sec. 7 to sit. No authority was cited in support of the objection on that ground, though *Rex* v. *Leconte* (1906), 11 O.L.R. 408, cited on the other side, is not an authority against it.

In my judgment the conviction by Mr. Beaman should be sustained.

MULOCK, C.J., concurred with ANGLIN, J.

Conviction quashed.

Note: *Police magistrates' jurisdiction in Ontario.*

The above decision places an interpretation upon a vaguely worded section of the Police Magistrates' Act of Ontario, conferring certain powers upon magistrates outside of the territorial division for which their commissions have appointed them. The section is, however, expressly limited to matters within the legislative authority of the Provincial legislature, and does not enlarge the general jurisdiction of the magistrates under the Dominion laws.

The decision above reported is consequently not applicable to a charge under the Criminal Code.

The general rule is that a magistrate or justice of the peace has jurisdiction either by reason of the residence or presence of the accused in the territorial division for which he holds his appointment, or by reason of the commission of the offence within its limits. There is, however, an enlargement of this general rule in the Revised Code sec. 584, formerly Code sec. 553, whereby, when an offence is begun within one magisterial jurisdiction and completed within another, such offence may be considered as having been committed in either of them. *R.* v. *Hogle* (1896), 5 Can. Cr. Cas. 53, 5 Que. Q.B. 59. The same section makes special provision regarding offences committed on boundary divisions between magisterial jurisdictions or within 500 yards thereof, and on trains, vessels, etc., in transit through various jurisdictions.

[SUPREME COURT OF THE NORTH-WEST TERRITORIES.]

BEFORE STUART, J.

THE KING v. TAYLOR.

Unlawfully being at large—Sentence on summary conviction—Appeal quashed for want of jurisdiction—Illegal order for bail—Proving conviction and sentence—Production of amended conviction pending trial—Warrant of commitment issued before formal conviction drawn—Validity—Computation of term of imprisonment—Cr. Code (1892) *secs.* 159, 801, 802, 955 (7)—*Revised Code* (1906) *secs.* 185, 793, 794—*Prisons Act, R.S.C.* 1906, *ch.* 148, *sec.* 3.

1. A signed minute of adjudication by justices endorsed upon the original information is not evidence in a subsequent prosecution for unlawfully being at large, of the sentence of imprisonment imposed by the justices, a formal conviction or a certified copy thereof being essential for that purpose.

2. An amended conviction correcting errors of form in a defective conviction previously transmitted for record under Revised Code sec. 793 may be filed at any time before the first conviction is attacked, and even pending the trial of a charge of unlawfully remaining at large laid under the defective conviction.

3. Process of execution upon a conviction may be issued after the signing of a minute of adjudication and before the drawing up of a formal conviction.

4. The time during which a person under sentence is improperly at liberty through an erroneous order for bail, is not to be counted as part of the term of imprisonment.

ARGUED: November 10 and 13, 1906.
DECIDED: November 14, 1906.

The accused was tried on 4th June, 1906, at Frank, Alberta, by two justices of the peace, under the provisions of secs. 782, 783 and 784 of the Criminal Code, and convicted, on a charge of being an habitual frequenter of a house of ill-fame, and was sentenced to two months' imprisonment in the police barracks at Macleod. A warrant of commitment was issued, under which he was received into the custody of Mr. Primrose, the officer commanding at Macleod, on 5th June, 1906. On 7th June, 1906, the prisoner was admitted to bail by Mr. Staines, an officer of the North-West Mounted Police and a justice of the peace, pending the hearing of an appeal against the conviction, of which the prisoner had given notice, and he was thereupon set at liberty and remained at large until the appeal came on to be heard before Harvey, J., at Macleod, on 2nd November, 1906. The appeal was dismissed by that Judge, on the ground that the Code gave no right of appeal, substantially the same reasons being given for the decision as were given in *Rex.* v. *McLellan* (No. 2) 10 Can. Crim. Cas. 14.

No order was then made or direction given as to custody of the prisoner, the Judge intimating that he did not consider he

had any power to deal with the matter at all. The accused remained at liberty and returned to Lethbridge, where he resided. On 5th November he was served with a notice, signed by Mr. Primrose, notifying him that he was unlawfully at large and requesting him to surrender himself at once into custody again. The accused did not comply with this notice, and he was thereupon arrested on a charge of being unlawfully at large within Canada, without some lawful excuse, after having been sentenced to imprisonment, and before the term for which he was sentenced had expired, contrary to the provision of sec. 159 of the Code. He was committed for trial on this charge.

C. C. McCaul, K.C., for the Crown.

C. F. Harris, for the accused, who was arraigned and pleaded not guilty, asked on his behalf for the right to elect as to whether he should be tried by a Judge alone or by a Judge and jury.

MACLEOD, ALTA., November 10, 1906.

STUART, J.:—I do not think the accused has any right of election. I think his case comes within the principle laid down by the Court *en banc* in *Rex* v. *Hostetter*, 5 Terr. L.R. 363, 7 Can. Cr. Cas. 221. The offence with which he is charged is, in my opinion, included in the offence of escaping from lawful custody referred to in sec. 66(*d*) of the North-West Territories Act, and he is, therefore, not entitled to elect.

Afterwards the trial was proceeded with and judgment reserved.

MACLEOD, ALTA., November 14, 1906.

STUART, J.:—The only question upon which I had any doubt in this case was whether any admissible evidence had been produced to shew that the accused had been sentenced to imprisonment. Mr. Dickson, the clerk of this Court for the Macleod

judicial district, was called, and produced two documents which he stated he had received by mail apparently from the justices of the peace who signed them. One was the information and complaint upon which the accused was originally tried by them, bearing on its face a minute of adjudication and sentence. This minute purported to be signed by both justices, and was in the words "pleads guilty, sentenced 2 months in common gaol at Macleod, with hard labour." The other document was a formal conviction, but was signed by only one of the justices. I am of opinion that neither of these constitute proper evidence of the conviction. I think nothing less than the formal conviction or a duty certified copy thereof is sufficient: *Rex* v. *Bourdon*, 2 C. & K. 336; Code, sec. 802. The former document is, therefore, insufficient, and the latter, not being signed by both justices, is also, I think, defective.

The witness, however, also produced a third document, purporting to be a more formal conviction, which was properly signed and sealed by both justices, and which he stated had been filed with him by the agent of the Attorney-General since the opening of the trial. One of the justices was called as a witness, and confirmed the signatures of himself and the other justice, and stated that he had handed the document to the police constable who had presented it to him for signature. I think I am justified, in the circumstances, in presuming that the justices were acting under the advice of the agent of the Attorney-General in signing the second conviction, and that they had authorized him to file it with the clerk.

The question then arises whether the magistrates, having once returned a conviction in pursuance of sec. 801 of the Criminal Code, were at liberty to return and file a further, amended, conviction. If they were not so entitled, there would be no admissible evidence that the accused had been sentenced to imprisonment. I am of opinion, however, that they were entitled to do so. Sec. 801 does not prescribe any time within which the conviction and other documents must be returned, and I do not see

why the magistrates should not be at liberty, if they discover that the conviction which they have filed is defective in any respect, and before any proceedings whatever have been taken to question or attack it, to correct the return which they have made, by substituting a new conviction properly drawn.

The case of *Cheney* v. *Payne*, 1 Q.B. 723, which was relied upon by Mr. Harris, was decided expressly upon the ground that, although the first conviction was never quashed, yet the proceedings which had in fact been taken had the same effect as quashing the conviction, and that it was then too late to put in an amended one. And the case *Ex p. Austin*, 50 L.J.M.C. 8, upon which Mr. Harris also relied, simply decided that it was no answer to a rule for certiorari, which had been obtained on the ground that a bad conviction had already been filed, for the magistrates to return a good one. The case simply decided that the applicant was not open to have his rule discharged on that ground. It did not decide that the magistrates could never return an amended conviction under any circumstances. There was no motion to quash, and Field, J., intimated that if such a motion were made, the result would be more doubtful.

In *Regina* v. *Smith*, 35 U.C.R. 518, also, the amended conviction was filed some weeks after an appeal had been entered against the first one and had been dismissed, erroneously, as the Court decided, on the ground that there was no right of appeal.

The facts of this case are quite different. No proceedings of any kind have been taken to attack the first conviction except the abortive appeal which Mr. Justice Harvey decided, and, I think, rightly that he had no jurisdiction to hear, as no right of appeal was given by the Code. I feel bound, therefore, to treat the matter as if no such proceedings had been taken at all and to decide the matter on the simple point whether, after the justices have once sent in a conviction and other documents in pursuance of sec. 801, they have any power to file a different and amended conviction to take the place of the former, and whether, if they do file an amended conviction, such conviction can be given in evidence on a subsequent criminal trial wherein it

becomes necessary to prove the conviction. I can find no authority, and none has been referred to, which prohibits them from doing so. On the contrary, I am of opinion that it would be their duty, if they discovered that an irregular conviction—a conviction improperly drawn—had been returned, to return and file a proper one in the place of it, and I am of opinion that they are at liberty to do this at any time as long as the first conviction had not been attacked: *Sellwood* v. *Mount,* 9 C. & P. 75. The fact that the second conviction was filed only some few minutes before it was tendered in evidence cannot, I think, affect the question in any way.

I do not think there is anything in the point taken by Mr. Harris that the conviction is itself the sentence. The authorities are quite clear that the justices often do, and may quite properly, issue process of execution before the formal conviction is drawn up. I therefore find that the accused was sentenced to two months' imprisonment on 4th June, and that he was received as a prisoner on 5th June by Mr. Primrose. If his release on bail on 7th June had been valid, the time during which he was at liberty on bail would, under sec. 955, sub-sec. 7, of the Code, not be counted as part of the term of imprisonment. As Mr. Justice Harvey gave his decision on 2nd November, it is clear that the two months' sentence would not have expired when he was arrested on the present charge. It is, however, clear that he was illegally released in the first place, as there was no right of appeal. Aside from the provision of the Code to which I shall presently refer, the common law rule is quite clear that the period during which a person under sentence is improperly at liberty is not to be counted as part of his term of imprisonment: Am. & Eng. Encyc. of Law, vol. 25, p. 327.

I think, however, the accused comes within the provisions of sec. 169, which is as follows: "Every one who escapes from custody shall on being retaken serve in the prison to which he was sentenced the remainder of his term unexpired at the time of his escape, in addition to the punishment which is awarded

for such escape," and that having been illegally released on bail, he had technically "escaped from custody": see Russell on Crimes, 6th ed., vol. 1, pp. 889 and 893. The accused knew that he had not in fact served the term of imprisonment to which he had been sentenced, and he must be held to have known the law, and, therefore, to have known that he was improperly at large, and this quite apart from the notice received by him from Mr. Primrose. I must, therefore, hold that he had failed to shew any lawful excuse for being at large, and that he is, therefore, guilty of the offence of which he has been charged, and a conviction will be entered: see *Bank of New South Wales* v. *Piper*, [1897] A. C. 383.

I do not propose, however, to inflict any serious punishment on him, in view of all the circumstances of the case. I find that in analogous cases in England, it has been customary to remit the prisoner to his original sentence, and I therefore sentence him to imprisonment in the Mounted Police Barracks at Macleod for a period of two months, and I direct, as I think I have power to do now that the whole matter is before me, that the unexpired portion of his original sentence shall be taken as running concurrently with the sentence now imposed.

Prisoner convicted.

Note: *Unlawfully being at large—Mens rea.*

By a statute of New South Wales (11 Vict. No. 4, sec. 7) a sale of wool under a lien "with a view to defraud," without the written consent of the lienee was made an indictable offence, and by the same Act and section, a sale or disposal of sheep without the written consent of the mortgagee, was also made indictable but without mention of intent to defraud.

The preamble of the statute recited that it was expedient with a view to increase the public confidence in the validity of preferable liens on wool and mortgages of live stock, "to surround them with the penal provisions necessary for the punishment of frauds."

The case of *Bank of New South Wales* v. *Piper* [1897] A. C. 383 (P.C.), was an appeal in an action for malicious prosecu-

Note—*Continued.*

Unlawfully being at large—Mens rea.

tion in respect of proceedings taken under this statute. The plaintiff respondent had sold sheep on which the bank held a lien but without their written consent. The jury found, however, that there had been a verbal consent by the bank's manager although the latter denied it.

It was held by the Privy Council that an intent to defraud was not an element of the statutory offence of selling the mortgaged live stock, that this was a matter for decision by the Judge and that a verdict must be entered for the defendant. The Committee further held that an intention to offend against the penal provisions of a statute constitutes mens rea and in this case, was proved by the respondent's knowledge that there was no written consent.

Sir Richard Couch in delivering the judgment of the Judicial Committee said:—

> "It was certainly competent to the legislature of New South Wales to define a crime in such a way as to make the existence of any state of mind of the perpetrator immaterial, and the question is whether in the case of the sale by the mortgagor it has not done so.
>
> "It is the intention of the legislature to make a sale by the mortgagor without the written consent of the mortgagee a criminal offence. It was strongly urged by the respondent's counsel that in order to the constitution of a crime whether common law or statutory, there must be mens rea on the part of the accused and that he may avoid conviction by shewing that such mens rea did not exist. That is a proposition which their Lordships do not desire to dispute; but the questions whether a particular intent is made an element of the statutory crime, and, when that is not the case, whether there was an absence of mens rea in the accused, are questions entirely different and depend upon different considerations. In cases when the statute requires a motive to be proved as an essential element of the crime the prosecution must fail if it is not proved. On the other hand the absence of mens rea really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent.

Note—*Continued.*

Unlawfully being at large—Mens rea.

"He (the defendant) knew that he had not the written consent of the mortgagee; and that knowledge was sufficient to make him aware that he was offending against the provisions of the Act, or, in other words, was sufficient to constitute what is known in law as mens rea."

In the case of *Sherras* v. *DeRutzen*, [1895] 1 Q.B. 918, an hotel-keeper had been convicted for the offence of selling liquor to a constable on duty, although the constable was not wearing his armlet, a fact which would indicate to the public that he was off duty, and which led the defendant to so believe.

The Queen's Bench Division quashed the conviction, and held that it would be straining the law to say that the publican, acting as he did in the bona fide belief that the constable was off duty and having reasonable grounds for that belief, was nevertheless guilty of an offence for which he was liable both to a penalty and to have his license indorsed.

In *Bank of New South Wales* v. *Piper*, [1897] A.C. 383, the the *Sherras* case is referred to with approval as an illustration of the absence of mens rea.

[COURT OF KING'S BENCH, QUEBEC.]

(APPEAL SIDE.)

BEFORE SIR ALEXANDRE LACOSTE, C.J., BOSSÉ, BLANCHET AND LAVERGNE, JJ., AND LEMIEUX, J., *ad hoc.*

THE KING v. McCRAW.

Murder—Evidence of statement by accused while in custody—Interrogation by police officer—Answer that he had nothing to state—Conduct as evidence—Silence when confronted with witness—Interest not to answer—Unqualified juror not on jury list summoned in mistake—New trial—Revised Cr. Code secs. 263, 921, 1010.

1. When the prosecution offers evidence of an alleged confession by the accused, it is the duty of the presiding judge to enquire into all the circumstances in order to ascertain if the confession was made freely, and, if he finds it was not, he must reject the evidence.
2. A prisoner's answer that he has nothing to say when confronted while in custody with the statement of a witness charging him with the crime of murder, cannot be considered as an admission or quasi-admission of the charge so as to be admissible in evidence against him.
3. The silence of the accused when incriminating facts are asserted in his presence does not afford a presumption of acquiescence, if the occasion, or the nature of the demand or the manner of making it will reasonably justify silence in a prudent man, and particularly if it is in the interest of the accused not to answer.
4. A person of the same or a similar name to that of a qualified juror and who is served in mistake for the qualified juror, but who is not himself upon the list of persons which which alone jurors may properly be summoned, is not a qualified juror under the Criminal Code (revised sec. 921, former sec. 662) and his acting as such is a good ground for ordering a new trial.
5. Such defect in the qualification of a juror goes to the jurisdiction of the tribunal and is not cured by sec. 1010 of the revised Criminal Code (former sec. 734).

QUEBEC, December 6, 1906.

(Translation).

The judgment of the majority of the Court was delivered by

LEMIEUX, J., *ad hoc*:—At the last term of the Court of King's Bench, Crown side, held at Three Rivers, Wallace McCraw, the prisoner was, on the 16th of March, 1906, found guilty of the murder of Percy Howard Sclater. After the verdict the presiding Judge sentenced McCraw to be executed on the 29th of June. The execution of the sentence was respited on several occasions since. McCraw obtained from this Court the right to appeal, and upon this appeal, the prisoner prays that the verdict be quashed and a new trial ordered.

This appeal rests upon three different reasons:

1. Illegality in the empanelling or composition of the jury.
2. Admission of illegal evidence.
3. Illegal instructions contained in the charge of the Judge to the jury.

At the hearing, the prisoner abandoned a great number of his reasons of appeal which were, and quite properly, reduced to three in number. I shall not consider all the reasons invoked by the prisoner; my brother Judges will dispose of them and shew that they are unfounded.

I propose to confine my remarks to the following two reasons of appeal: (1) Whether a portion of the evidence admitted by the Court and upon which the Judge's charge to the jury was based for the purpose of establishing the guilt of McCraw was legal or not, and if the charge or instructions of the trial Judge with reference to this evidence was legal or not; (2) Then I shall discuss the question whether the jury was composed according to law.

In order to understand the opinion at which I arrive, I shall briefly state the facts and circumstances from which arose the evidence and the portion of the Judge's charge of which the prisoner complains.

The supposed murder of Sclater was committed at a place known as Grand Anse, on the 5th of March, 1905. His death having occurred under suspicious circumstances, the judicial authorities at Three Rivers resolved to investigate the matter, in order to ascertain if the death had been violent or criminal, and, for that purpose, ordered constable Beaulieu to go to Grand Anse with subpoenas to summon as witnesses the persons who, according to information received, might be able to disclose any facts of a nature to enlighten the authorities.

Arriving at Grand Anse on the morning of the 9th, Beaulieu served a subpoena upon McCraw in the house of one Dontigny, and a few moments afterwards, having entered another room of the house and while talking about the occurrence namely, the death of Sclater, with Dontigny and another person named Adams, the latter told him: "I had decided to place McCraw under arrest and I was going with another man to arrest him." Thereupon Beaulieu at once returned to the room where the prisoner was and told him: "You are my prisoner."

Beaulieu arrested McCraw, hand-cuffed him and brought him down to Grandes Piles where he slept with him at Langis' Hotel. During the night McCraw was kept in custody, his hands still hand-cuffed and the chain of the hand-cuffs fastened to the bedstead.

I give these details in order to shew that McCraw was then detained as a prisoner and treated with those just and severe measures such as are taken against a prisoner suspected of having committed a great crime.

The prisoner was thus held in custody until noon on Friday when detective McCaskill arrived from Montreal instructed by the Attorney-General to investigate the death of Sclater. As soon as he arrived, McCaskill proceeded to the second storey of the house where McCraw was held and guarded as a prisoner and he had with him a conversation during which the detective told him that he was not obliged to discuss the question with him, McCaskill, but that everything he would say would be used

as evidence against him. McCraw answered that he knew nothing about the matter. McCaskill then came down to the first storey of the house and there met the widow of the deceased and one Mrs. Skeene who, he supposed, knew something concerning the death of Sclater. The widow having apparently made certain declarations to McCaskill the latter ordered McCraw to be brought down. He was still hand-cuffed and in the presence of McCraw and while pointing to him with his finger he put the following questions to Mrs. Sclater: "Q. Is this the man that you told me murdered your husband?" The woman answered "Yes." Is this the man that you told me committed the murder? The woman answered again "Yes."

After these questions and answers, McCaskill, in the presence of Mrs. Sclater, addressed the prisoner McCraw and said: "In the face of this declaration, have you anything to state." McCraw answered "Absolutely nothing."

Witness Matthews who was present when these questions were put said that McCraw "never opened his lips."

Now it is well to remember that before and during this incident McCraw was a prisoner and under arrest, as McCaskill states when he says: "He was treated as a person under arrest, as a prisoner."

The Judge presiding at the trial admitted as legal the proof of the incident which I have just mentioned, and, when charging the jury he relied upon the occurrence as being an element of proof establishing the guilt of McCraw.

The questions put to Mrs. Sclater by McCaskill, in the presence of McCraw, the answers which she gave, the silence of McCraw or his declaration that he had nothing to say, as well as the interpretation by the Court that the silence of McCraw constituted a *quasi* admission and was a link in the evidence against him, all this gives rise to legal difficulties which may be considered under different points of view.

The first question is that of ascertaining if McCaskill was authorized and could lawfully subject Mrs. Sclater to the ques-

tions put, in the presence of McCraw, under the circumstances above recited.

We may borrow language of the jurisprudence and also of text writers and declare that the conduct of McCaskill could not be justified in thus putting questions to a third person in the presence of McCraw with the object of bringing forth an admission from the prisoner, and in afterwards asking McCraw what he had to say in response to the declarations of Mrs Sclater, who charged him with the murder of her husband.

The placing of the prisoner in the presence of Mrs. Sclater and seeking by this system of intimidation to induce the prisoner to speak and obtain admissions from him was a method which has been disallowed by all the Judges in England and in this country.

My opinion on this point rests upon high authority.

In the case of *R.* v. *Histed,* 19 Cox Criminal Cases, p. 16, Judge Hawkins said:—

> "Questions put by the police to a prisoner, tending to elicit incriminating answers should be rejected, if there is any reason to believe that a trap was being laid for the prisoner."

In *Regina* v. *Meek,* 3 F. & F., p. 822, Judge Mellor used the following language:—

> "The law does not allow the Judge or the jury to put questions in open Court to prisoners; and it would be monstrous if the law permitted a police officer to go, without any one being present, to see how the matter was conducted, and put prisoner through an examination and then produce the effects of that examination against him. Under these circumstances, a policeman should keep his mouth shut and his ears open."

In the same case Judge Mellor also said:—

> "The practice of questioning prisoners, by policemen, and thus extracting confession from them, is one which is strictly reprehensible and which ought not to be permitted."

It is not necessary to cite additional authorities; but I will summarize my opinion by invoking an authority carrying as much weight as that of the English Judges, and it is the opinion of the Chief Justice of this Court, who, in a recent case made use of the same language as that of Judge Cave which I have just mentioned and who very forcibly expressed his opinion, that police officers could not submit interrogatories to prisoners.

(*R.* v. *Hackett,* K.B., Montreal, June, 1906.)

I think that the incident brought about by McCaskill was illegal and that the Court as soon as the details of this incident were disclosed by the witnesses, should have instructed the jury not to take this evidence into account.

Undoubtedly the community has its rights and obligations, among others the right to protect its members by punishing crime and criminals; but recourse should not be had, even for the triumph of justice, to proceedings which are repudiated by the most faithful interpreters of the law.

But there is more in this case. No admission or confession of a crime made to a person in authority can be admitted in evidence against an accused unless such admission is free and voluntary and after the prisoner has received what the text writers call *a caution,* that is, after having been put on his guard that he is not obliged to speak but that if he says anything his declarations might be used in evidence against him.

The text writers go further and say, and in that respect all agree, that any admission made to a person in authority but which is the result of an inducement, has no effect and can not be used as evidence against the person who made it. In other words, the confession or admission of a crime obtained or extorted by a person in authority by means of promises or threats, direct or indirect, cannot be used in evidence in order to establish the guilt of the accused. And this rule governs more particularly when the person in authority is a police officer, who, like McCaskill, resorts to subterfuges and tricks and lays a trap for the prisoner in order to obtain from him declarations which

might inculpate,—"When the prisoner has been entrapped into confessing," expression of Hawkins, J., 19 Cox Criminal Cases, p. 7, in *R.* v. *Histed.*

Phipson, Law of Evidence, p. 221, says: "Recent decisions shew the increased tendency to exclude evidence obtained by the police, by unfair or irregular means."

The opinion of Judge Parke in the case of *Rex* v. *Warringham*, 2 Den. Crown Cases 447, has been, as it were, the basis of all the decisions of the Courts in England upon this question. He says:—

> "In order to render a confession by a prisoner admissible, the prosecution must shew affirmatively, to the satisfaction of the Judge, that it has not been made under the influence of an improper inducement; if this appears doubtful on the evidence, the confession ought to be rejected."

In the present case, McCaskill had received from the prisoner a statement that the latter did not know anything about the affair. A few minutes afterwards he has a conversation with Mrs. Sclater who lays a charge against McCraw. Then he brings McCraw in her presence and asks Mrs. Sclater, "Is this the man that you told me committed the murder?" and Mrs. Sclater answers "Yes." Is that not, in view of the doctrine and jurisprudence, holding out an inducement and a threat to the prisoner in order to compel him to speak and to confess? Was this not an interrogatory to a prisoner suspected of a crime and one which was perfidious and insidious and ingenuous, although McCaskill has not the credit of the invention, because on many occasions in England the same process was followed but was in every case repudiated by Judges of very high standing. These questions implied a threat; they meant nothing more or less than this: "McCraw, you are an imposter and a liar. You stated to me a moment ago that you were not guilty of the death of Sclater, but you see now that his widow charges you and states in the most formal terms that you are the murderer. Of what use would be your denial? These women will contradict you

and will swear that you are guilty. It is useless for you to deny."

Taylor on Evidence, vol. 1, p. 571, quotes a similar case where the admission should be declared to be illegal and therefore so declared by the Courts of justice, the case where a police officer uses the following language: "It is of no use for you to deny it; for there are the man and boy who will swear they saw you do it."

Without proceeding any further into useless explanations, it is quite evident to any observer that McCaskill's object was to induce McCraw to speak and that he had engineered this theatrical scene in order to entrap McCraw, to intimidate him, and to obtain or extort from him, by means of a trap insidiously held out, an admission or a confession.

The Supreme Court of the North-West Territories in *R.* v. *McDonald,* 2 Canadian Criminal Cases, p. 221, refused to admit the proof of the admission of a crime where a false declaration had been made by a detective to the effect that he had seen the accused commit the crime. *A fortiori,* where the admission is obtained by the statement made by a third person in answer to an illegal question put by a person in authority and for the purpose of contradicting certain declarations previously made by the accused.

I therefore come to the conclusion upon this question, that, even assuming that the silence of McCraw or his refusal to answer the question of McCaskill implied a confession, such confession was not made voluntarily and freely, but was the result of an inducement, in other words, of intimidation and threats and also of an illegal interrogatory to which the prisoner was submitted by McCaskill.

Following the rule laid down by this Court in the case of *Viau* (7 R.J.Q., Q.B., p. 304), that which I myself followed on different occasions, when the Crown intends to adduce any proof of a confession, the Court should inquire as to all the circumstances in order to ascertain if the confession was made freely.

According to this rule it was incumbent upon the Judge who

presided at the trial to hold that the alleged confession of McCraw had been the result of an inducement; it was also incumbent upon the Judge to instruct the jury that the alleged confession of McCraw could not be admitted as evidence or presumption of guilt against him, and, therefore, should not be taken into consideration. This rule was not followed however; on the contrary, the Judge approved and ratified what had been done and to the extent that he instructed the jury that the silence of McCraw constituted one of the links in the evidence of guilt against him.

Now, as to the last and the most important question upon this part of the case, that of ascertaining whether the silence of McCraw or his answer "absolutely nothing" given to McCaskill who had said to him: "In the face of this declaration have you anything to say?" should be considered as an admission or a *quasi* admission of guilt or as an admission that he had murdered Sclater, as Mrs. Sclater had stated. An admission or a confession is a statement by a person admitting the commission of a crime or a participation therein.

One who admits or confesses inculpates himself. Now in the present case, we are far from being in the presence of an inculpatory statement; we believe we are dealing with a case of an exculpatory declaration.

Indeed, McCaskill had had an interview with McCraw during which the latter informed him that he knew nothing about the matter. This is a positive denial of any participation in a crime. A few minutes afterwards McCaskill who had just informed him that he was not obliged to speak but that, if he did so, anything he might say would be brought in evidence against him, put this question to the prisoner, "What have you to say in the face of the declaration made by this woman who says that you are the murderer of her husband?" "Absolutely nothing," answered McCraw; or he remained silent. The words "absolutely nothing" taken in their grammatical sense can not be construed as a confession of the crime. These words might

mean "I know nothing of this matter except what I have already declared."

And this answer could be considered as a continuation of the system of defence which McCraw had adopted, namely, that he knew absolutely nothing.

The authors lay down as a rule and principle that the silence or refusal of a prisoner to answer a charge laid against him should never be interpreted as a confession, if it is in the prisoner's interest not to answer, and upon this question there is not any dissent and moreover it is the duty of the trial Judge to so instruct the jury.

I shall quote a few authorities upon this point.

Phipson on Evidence, p. 221: "When the circumstances are such that a reply cannot properly be expected, the party's silence will afford no inference of assent."

Amer. & Eng. Enc., Vo. Confession, p. 557:—"Thus it is well settled that to render such evidence admissible, it must appear not only that it was voluntary and that the prisoner was at liberty to make a reply to the accusation, but also that the statement addressed to him was made by such person and under such circumstances as naturally to call for a reply."

Phillips on Evidence, vol. 1, p. 400, 9th ed.: "As such statements frequently contain much hearsay and other objectionable evidence, and as the demeanor of a person upon hearing a criminal charge against himself is liable to great misconstruction, evidence of this description ought to be regarded with much caution."

Greenleaf, vol. 1, p. 273, note (*c*): "The former rule of evidence that one's silence shall be construed as a virtual assent to all that is said in his presence, is susceptible of great abuse, and calls for a course of conduct which prudent and quiet men do not generally adopt. If that rule be sound to the full extent, as laid down in some of the early cases, it would be in the power of any evil-disposed person to always ruin his adversary's case, by drawing him into a compulsory altercation in the presence

of chosen listeners, who would be sure to misrepresent what he said. Nothing could be more unjust or unreasonable. Hence, in more recent cases, the rule has undergone very important qualifications. The mere silence of one, when facts are asserted in his presence, is no ground of presuming his acquiescence, unless the conversation were addressed to him under such circumstances as to call for a reply. The person must be in a position to require the information, and he must ask it in good faith, and in a manner fairly entitling him to expect it, in order to justify any inference from the mere silence of the party addressed. If the occasion, or the nature of this demand, or the manner of making it, will reasonably justify silence in a discreet and prudent man no unfavourable inference therefrom should on that account be made against the party. And whether the silence be any ground of presumption against the party will always be a question of law."

It was in the interest of McCraw not to speak and not to answer McCaskill and in acting as he did he followed the prudent course mentioned by the authors and which McCaskill himself had advised him to follow.

Indeed, it was of no use for McCraw to speak. Had he stated in the most emphatic manner that he was innocent his statement would have been of no benefit to him; because the accused cannot establish his own innocence by his declaration and protests. On the other hand, it would have been fatal for him to make any incriminating statements because these statements would have been used against him at his trial. In face of this dilemma, the most ordinary idea of prudence suggested that he should remain silent. Under these circumstances, the Court was not justified in considering the silence of the prisoner as a confession and, in law, the Judge was bound to instruct the jury and tell the jury that the evidence of the silence or of the refusal of the prisoner to answer was illegal.

But what happened was the contrary; because the Judge insisted upon this part of the evidence and said:

"It remains undeniably established that Mrs. Sclater, the accomplice of the prisoner, namely, the two persons mentioned in the indictment, and the woman to whom McCaskill when the prisoners were in presence of each other had asked: Is that the man whom you state has murdered your husband? and that she answered "Yes." "Is that the man whom you informed where your husband's revolver was?" she answered "Yes." "Is that the man who came afterwards and informed you that he had murdered your husband with the revolver?" to which she answered "Yes." And in answer to all these questions the prisoner did not say anything.

"These statements made under the circumstances in which they were made would not be sufficient, by themselves, to justify you in finding a verdict of guilty against the prisoner at the bar, but it is one link which you must add to the other links in the evidence and you must appreciate these facts."

Of course, it is impossible for us to say to what extent this evidence and this portion of the charge of the Judge influenced the jury and contributed to the verdict of guilty pronounced against McCraw; but it is easily conceivable that the axiom "Qui ne dit mot consent" applying to McCraw who had given no answer to McCaskill when the latter asked him what he had to say to the charge of murder brought by the Sclater woman, must have particularly impressed twelve ordinary laymen and that their impression became a certainty when the Judge instructed them that the silence of the accused was a link in the evidence, in other words, that his silence completed the proof of guilt or corroborated the evidence to the extent, that, without this link in the evidence, the charge would possibly not be founded nor established.

There existed another reason not to attach any importance to the silence of McCraw or any faith to the charges of Mrs. Sclater; it was that this woman who was called on eight different occasions before the magistrate to testify and evidently to

establish the circumstances above recited had refused to answer. Also, when she was called as a Crown witness at the trial she stood mute refusing even to say whether she believed in God and merely answered: "I cannot answer."

McCraw complains of the manner in which the jury was impanelled and says that one Joseph Louis Alfred Montplaisir alias Wilfrid Montplaisir alias Phine Montplaisir was unlawfully sworn and acted as a juror in this case.

In other words, the prisoner maintains that Montplaisir was not qualified as a juror and that he impersonated another Montplaisir. The prisoner raised this objection before and after the verdict. In fact, it appears, that there were two persons by the name of Joseph Montplaisir on the general list of jurors for the Parish of Cap de la Madeleine under the numbers 33 and 1001 respectively.

One was the father of the juror who served and the other was his cousin. (Affidavit of secretary-treasurer Rochefort).

The father of the juror who served was commonly known under the name of Joseph although he had been christened under another name. He was qualified as a juror and his name appeared on the list of jurors as Joseph.

The secretary-treasurer Rochefort, gave an affidavit which remains uncontradicted, and he declares that Joseph Louis Alfred generally known under the name of Wilfrid alias Phine Montplaisir, the person who acted as a juror, was not qualified as a petty juror and that he was not on the list of the petty jurors.

This man Montplaisir came into Court in answer to a summons or subpoena addressed to his father or to his cousin. Before the opening of the term Montplaisir came to the sheriff and the latter, after inquiry made, took upon himself to change the subpoena directed to one of the two Joseph Montplaisir by adding the name of "Wilfrid." This alteration did not improve matters, because it thereby appeared that the summons was addressed to a juror by the name of "Joseph Wilfrid Montplaisir," which name did not appear on the general list of jurors.

Now the question that the Court has to solve is the following: Whether the said Joseph Louis Alfred alias Wilfrid alias Phine Montplaisir was, in any manner, qualified to act as a juror.

If this question is answered in the negative, then should the verdict be quashed in consequence?

No person can act as a juror, although he might possess all the moral, intellectual and property qualifications, unless he has been legally selected and summoned regularly as a juror under sec. 2619 of the R.S.Q., which reads as follows: "The following persons are qualified to act, and, when duly chosen and summoned, are bound to serve as petty jurors."

The English version uses the words "when duly chosen" and also the words "duly summoned."

This statutory enactment is completed by article 662 of the Criminal Code which enacts that: "Every person *qualified* and *summoned* as a petty juror according to the laws for the time being in any province of Canada shall be duly *qualified* to serve as such juror, in that province."

Again I say that the law imposes two conditions *sine qua non*, in order that a person may act as a juror, namely he must be duly qualified and duly summoned.

Then the law enumerates a series of conditions and proceedings to be followed before any person can be considered a competent juror and duly qualified as such.

Such person must be of the male sex and of age and his name must appear on the valuation roll as a proprietor or a lessee for a fixed amount, sec. 2619 R.S.Q.

Such person must not come within the classes of persons mentioned in article 2620 and who are declared not qualified to serve as jurors, such as those who are not inscribed on the valuation roll, minors, persons afflicted with certain ailments, mental or corporal, those accused or found guilty of treason, or a felony, and also aliens.

The fact of being a male person of age and of appearing upon the valuation roll and also of not being under one of the

classes of individuals declared to be not qualified and incompetent constitutes what I might call the original title of any person to exercise the privilege of a juror.

Indeed, the law does not stop there and it was not intended that each individual citizen would have the right to sit as a judge of his own competence to act as a juror; for that reason, the law establishes a tribunal with a competent authority and from the decisions of which there is no appeal, which decides, determines and certifies that such a person is competent and capable to act as a juror.

The action of this authority in the premises is one of the essential and absolute conditions imposed by the law.

Thus, the secretary-treasurer who, for that purpose, is considered to be an officer of the Court (sec. 2626) is instructed to prepare, each year, and moreover when requested by the sheriff (secs. 2622, 2623, 2626) a list of persons qualified to act as jurors according to the valuation roll or according to information by him received when the roll is prepared. He must eliminate from the list those who according to the same roll or sources of information are not competent or not qualified. The list is sworn to by him and is revised by the council after a public notice. After this revision is made the list is duly certified by the mayor and transmitted to the sheriff. The list must be used for the preparation by the sheriff of the general jury list.

It is only from this general list of jurors declared competent by the secretary-treasurer and the municipal council that the sheriff can select the names of those who will form the panel of a jury for a criminal term. (Sec. 2658.)

It should not be in vain that the law has taken such precaution to insure the competency and qualification of the jury. The Legislature has done so evidently in order to avoid any possibility of intrusion in the jury of incompetent or unqualified persons and in order to prevent by such means, all impersonation done for a motive of hatred and favour.

Under these conditions Joseph Louis Alfred alias Wilfrid alias Phine Montplaisir was not duly qualified to act as a juror

in the trial of McCraw. His name did not appear, as required by the statute in a clear and absolute manner upon the list of jurors. He had not been found competent by the regular authority and had not been certified, according to law, to be a qualified juror.

The presumption, in such a case, is that he was incompetent and not qualified inasmuch as his name did not appear upon the valuation roll.

A person to whom the Crown at the opening of the trial gives the following warning: "The persons whose names shall be called are the jurors who will decide your case" has the right to expect that such persons are qualified as jurors, according to law, and appear as such upon the list of jurors.

He has the right to rely with confidence upon this list of jurors in possession of the officer of the Court and purporting to contain the names of persons recognized competent as jurors by the competent authority.

But this legitimate expectation of the accused that the jury will be legally composed is frustrated the very moment when, without right, certain persons whose qualification has not been recognized, admitted and verified according to law by authority, are introduced in the jury Such an outsider forming part of the jury might not present the moral, intellectual and physical conditions required, he might turn out to be an imposter or one who wilfully personates another and who for unlawful reasons wishes to introduce himself upon the jury. He might be a person not qualified to act as a juror, such as are minors and aliens or an individual accused or convicted of treason or felony.

The policy of the law is that an accused cannot be deceived in that way and that it would be unlawful, as in this case, to say to him: "Here is one of your jurors whose name is Joseph Montplaisir; this man is on the list, and, therefore, is qualified to act as a juror," when such is not the case, and when the person who comes forward is neither Joseph Montplaisir nor a person qualified to act as a juror. If such a condition of affairs

was tolerated in the case of one juror why should it not be permitted by the law in the case of ten jurors? And if that was allowed, the object of the law would not be obtained; the list of jurors would not serve the purpose for which they are prepared and we would not be dealing with a jury composed of men and citizens selected with all the scrupulous care which the Legislature shews in like cases for the purpose of rendering justice to whom justice is due.

It was contended that Montplaisir had been challenged for cause and that two triers appointed under sub-sec. 8 of sec. 668 of the Criminal Code had found the challenge for cause to be unfounded. This contention offers no argument in answer to the objection that Montplaisir was not qualified because he was not on the list of jurors.

The triers could only deal with the reasons or challenge arising (*a*) from the fact that the juror was not impartial, or (*b*) because he was convicted of an offence punishable with death or imprisonment during twelve months, or (*c*) that he was an alien.

The triers could pass upon no other cause of challenge. (Sub-sec. 5 of sec. 668).

Therefore they could not inquire or decide whether the juror appeared on the valuation roll or was inscribed on the list or whether he had been legally and regularly summoned.

This question of indifference or unfitness could not be passed upon in advance by the municipal council or the secretary-treasurer but could only be decided at the time of the trial. That is the only question submitted and decided by the triers.

Therefore the objection remains entire, namely, that the qualification or competence of the juror must always be determined by the list of jurors upon which his name has been placed by the secretary-treasurer or the council.

Now if the rule of law above mentioned be founded upon two texts of the law adopted respectively by the Federal Parliament and by the Provincial Legislature to the effect that a person must be duly qualified and legally summoned to act

as a juror, it follows that sec. 734 of the Criminal Code cannot meet successfully the objection taken by the accused against juror Montplaisir.

This article 734 of the Criminal Code entitled "Judgment not to be arrested for formal defects" reads as follows:

> "Judgment, after verdict upon an indictment for any offence, shall not be stayed or reversed because any person has served upon the jury who was not returned as a juror by the sheriff."

In other words the Code merely goes the length of enacting that if a person acts as a juror without being summoned then the verdict will not be avoided for that reason.

The law therefore deals only with the summons of a juror, but the law does not declare that the verdict will be valid if a person who acted without being summoned is moreover not competent and not qualified as a juror. If such was the law, the law would not be consequent with itself and the Criminal Code would come in conflict with the two texts of law above mentioned.

If we were to hold the contrary and interpret the statute otherwise we would in effect disregard the spirit of the same law according to which a prisoner must be tried, by jurors and not by persons who are not jurors.

The fact of a person acting without authority as a juror cannot be considered to be a mere informality such as those enumerated in sec. 734. On the contrary, such a fact constitutes an absolute want of jurisdiction and competence on the part of the jury; it raises the objection against the composition of the tribunal and the very legal existence of the jury itself.

There seems to be only one case where, in my opinion, the law through necessity and reasons of urgency allows certain persons not qualified as jurors to act as such in criminal matters; it is the case where it has become impossible to swear in and form a complete jury because the panel is exhausted as a result of the challenge for the Crown as well as for the prisoner. The Code,

in such a case, in order to obviate the serious inconvenience and to guard against what I may call "blocking the trial," enacts that the Court upon application may order that a certain number of persons, qualified or not, be summoned as jurors in order to complete the jury.

That is the only exception to the general rule and one can see that this extraordinary procedure is surrounded with great precautions.

The cases of *Feore, Brisebois* and *Mellor,* cited at the argument offered no similarity with the present case and the objections which were raised in these cases against the manner in which the jury was composed did not present the same character as in the present instance.

In the present case Montplaisir who impersonated another person was, according to law, absolutely incompetent. Thus, in the case of *Feore,* 3 Quebec L.R. 219, with which I am familiar having been the attorney for the prisoner, the verdict was quashed under circumstances very different from those now under consideration. Crane had served as a juror in the place and stead of Grant, but Crane was qualified to act as a juror and was on the panel for the term. And it was by a mere error or confusion of names that he had gone into the box in the place of Grant. Therefore the objection against the verdict in that case, it is easy to conceive, did not have the force of that made in the present case. Yet, the verdict in the case of *Feore,* 3 Quebec L.R. 219, was quashed. This decision was rendered under a law similar to the law as it now exists.

The case of *Brisebois* (1888), 15 S.C.R. 421, could be relied upon by the appellant inasmuch as two Judges against two refused to quash the verdict in a case where one Moise Lamoureux had served as a juror in the place of one Joseph Lamoureux after having received a summons which had been addressed and directed to Joseph Lamoureux. This case is not similar to the present one. Moise Lamoureux, who had served as a juror and had taken the oath under the name of his brother Joseph, appeared on the general list of jurors and therefore was qualified

to act as a juror. This seems to have influenced the two Judges of the Supreme Court who were to maintain the verdict.

In the *Mellor* case (1853), 7 Cox Cr. Cas. 454, one of the jurors who answered to the name of another juror was also qualified to act as such and moreover had been summoned as a juror for the term of the Court.

In these three cases objections therefore had been taken, in the one case to the person whose name appeared on the list of jurors and in the two other cases to persons who were not only upon the general list but who also appeared on the panel for the term. Such is not the case in respect to Montplaisir, who was never qualified and who was not qualified at the date of the trial. The recent jurisprudence in Canada offers no case similar to the present one.

For these reasons which I have probably discussed too much at length, we are to maintain the appeal to quash the verdict and to order a new trial.

That is the conclusion the majority of this Court has arrived at.

SIR ALEXANDRE LACOSTE, C.J.:—The Judge allowed the evidence of the declarations of the woman Sclater made in the presence of the accused. Such evidence was only admissible if the accused had expressly or impliedly acquiesced in these declarations. Under such circumstances the proof is allowed conditionally. If the acquiescence of the accused is not proved, the evidence of the declarations preserves its character of inadmissibility and the Judge is not entitled to submit the same to the jury but very much less is the Judge entitled to instruct the jury to use this evidence in order to support a presumption against the accused.

In the present case no proof has been adduced of the acquiescence of the accused. According to the evidence of two witnesses; the accused declared that he had nothing to say, and, according to another witness, he remained silent. Under the circumstances not the least presumption of guilt could be inferred

from the silence of the prisoner because the constable had just instructed him that he was not bound to answer.

It is the province of the Judge to decide as to the admissibility of the evidence. If the Judge submits to the jury any evidence clearly inadmissible and invites the jury to appreciate such evidence he commits an error of law susceptible of being revised by this Court.

These declarations of the woman Sclater were of such a nature as to seriously influence the jury and even to determine their verdict. The instructions of the Judge, upon this point, were therefore erroneous, and in my opinion, caused a serious wrong to the accused.

Wilfrid Montplaisir was not qualified to act as a petty juror in accordance with the law of this Province, he was not summoned, his name did not appear on the panel, but he impersonated Joseph Montplaisir, a qualified juror whose name was on the panel, but who had not answered the summons. The accused was not aware of this fact until the verdict and he then made a motion that the verdict be quashed and his motion was dismissed. Under the circumstances, I am of the opinion that the verdict should be quashed.

Our Courts have on different occasions passed upon the validity of a verdict and have held different views when a person who was not summoned answered to the name of another and acted under the assumed name. Our jurisprudence is not settled upon this point. I am of the opinion, that, in such a case, the verdict should be quashed. It seems to me that the error under which the accused is acting prevents him from properly exercising his right of challenge.

Under Art. 746 of the Criminal Code a new trial can be granted where a challenge has been improperly disallowed. Should we not come to the same conclusion if, as the result of an error for which the accused is not responsible, he was unable to exercise his right of challenge with full knowledge? The substitution of one person for another might be the source of frauds perpetrated against the accused.

But in this case there is a feature not to be found in the cases decided by the Courts of this Province. The person who acted was not qualified to act as a petty juror, his name did not appear upon the role as a proprietor, lessee or occupant of immoveables of a value to qualify him. Revised Statutes of Quebec Art. 2619 to Art. 2620. These provisions of the provincial law were confirmed by Art. 662 of the Criminal Code.

The Crown argues that under Art. 734 of the Criminal Code the verdict should not be quashed. It is provided in this article that the verdict will not be quashed "because any person has served upon the jury who was not returned as a juror by the sheriff or other officer."

This provision means that the omission of the name of a person on the panel for the term would not nullify the verdict but the article of the Code should be construed strictly and it does not dispense with the qualification of a juror who acts. It does not deprive the prisoner of the right to be tried by twelve jurors having the required qualification.

Article 662 of the Criminal Code enacts that: "Every person qualified and summoned as a juror or petty juror according to the laws in force for the time being in any province of Canada shall be duly qualified to serve as such juror in criminal courts in that province."

Article 734 dispenses with the summons but not with the qualification.

For this additional reason I am also of the opinion to quash the verdict.

LAVERGNE, J., concurred with LEMIEUX, J.

BOSSÉ and BLANCHET, JJ., dissented and were of opinion that the verdict should stand.

New trial ordered.

R. A. E. Greenshields, K.C., and *N. K. Laflamme*, K.C., for the prisoner.

E. Guerin, K.C., and *Charles Lanctot*, K.C., for the Crown.

[SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE IRVING, MORRISON AND CLEMENT, JJ.

THE KING v. BRUCE.

Confession or admission to constable after arrest—Statement of constable to prisoner committed for trial—Threat or inducement—Assault with bodily harm—Question of accused as to extent of his punishment—Inference that accused present when injuries inflicted—Revised Cr. Code (1906) *sec.* 295.

1. The fact that a prisoner committed for trial for assault occasioning bodily harm was told by the constable removing him to gaol under the commitment that the assaulted party would die, is not evidence of an inducement or threat to the prisoner so as to make his subsequent question "What do you think I will get—about 15 years?" inadmissible against him.
2. The prisoner's question under the circumstances raised a strong inference that he was present when the injuries were inflicted.

ARGUED: January 8, 1907.
DECIDED: January 8, 1907.

Motion for leave to appeal from the ruling of Hunter, C.J., in a criminal trial held before him and a jury at the Nelson Fall Assizes, on the 12th of October, 1906.

The accused and a man named McGarvey had a quarrel in which McGarvey sustained bodily injuries, subsequently contracting pneumonia and dying. Accused was charged with murder, but was acquitted, and was then tried for committing an assault on McGarvey, occasioning actual bodily harm. The constable when arresting accused said: "I arrest you for assaulting old man McGarvey," and as he was placing the handcuffs in position, accused said, "I want to go to the office to get some money. How much will the fine be?" The constable said he did not know anything about that. On the way to the police

quarters, some four or five miles from the place of arrest, accused asked to have the handcuffs removed, to which the constable replied that he was taking no chances that he "had not much sympathy with a man who would kick an old man and bite him." At the preliminary hearing, in answer to the usual question from the magistrate, the accused said, "It is just like a dream to me."

Accused was committed for trial and while being taken to gaol, the constable, in the morning, told him McGarvey would die. While the constable was replacing the handcuffs after dinner (some 24 hours after arrest), accused asked the constable: "What do you think I will get?—about 15 years?" to which the constable replied that he did not know. Accused then said: "I had better get a lawyer; as I don't know anything about this business." The constable said: "I guess you had." At the trial, it was objected on behalf of the accused that this evidence was not admissible, the remarks of the constable, coupled with the placing on of the handcuffs, being in the nature of a threat or challenge to the accused to speak. The learned trial Judge ruled that there had been no inducement, and held the evidence to be admissible. The learned Judge charged the jury on this point as follows:—

> "With reference to the statements made to the constable, you heard the discussion that took place between counsel and the Court on the question of the admissibility of those statements. It is admitted that no caution was administered to the prisoner by the constable; all that took place, in short, was that the constable went and arrested him for assaulting old man McGarvey, and the prisoner answered, 'I want to go to the office and get some money, how much do you think the fine will be?' The constable answered, 'I don't know anything about fines.' Now there have been expressions of opinion by learned Judges that where a man is charged with a criminal offence it is the proper thing for the constable to warn him; to tell him that anything he says may be used against him; and if that precaution is not taken by the con-

stable some Judges have gone so far as to say to the Crown that they do not think it is proper to adduce that evidence. But so far as I am aware, I know of no decision saying it is the legal duty of the constable to administer that caution. This much is clear, that when a constable arrests a prisoner and states the charge as he should do, he is prohibited from questioning the prisoner; and if the prisoner is questioned by the constable and makes any answers, those answers are not to be used against him. The only statements which can be used are those made voluntarily by the accused without undue pressure or fear or inducement or threat. But, as I say, I know of no case that has gone the length of deciding positively that it is the duty of the constable to warn the accused that anything he says may be used against him, and if that warning is not given, anything the prisoner says is not admissible. I think the law is in this condition: that if the constable stands pat and says nothing and the prisoner makes a voluntary statement, that statement is admissible. I have so ruled, and of course, as the law stands, you are bound to abide by any direction on the law I give you, but on the facts you are the sole judges. If I am wrong in that decision, the prisoner has a remedy by going to the Court of Appeal, and in the meantime you must take that as the law."

VICTORIA, B.C., January 8, 1907.

S. S. Taylor, K.C., for the prisoner. The mere fact of arresting the prisoner and putting on the handcuffs was an inducement to him to speak. He should have been warned. Prisoner was drunk the night before, and when called upon by the magistrate to make a statement he said, "it is just like a dream to me." After leaving the magistrate's court, he was informed that the man was going to die, when he asked the question, "What do you think I will get?" etc. Neither of these statements is admissible and should not have been received without a warn-

ing. The general principle governing is enunciated in *Rex* v. *Kay* (1904), 11 B.C.R. 157, 9 Can. Cr. Cas. 403. An assertion applies equally with a question. The constable's first duty is to tell the accused that he has a warrant for his arrest, and as soon as he sees that the man is going to talk, to warn him. The Crown here has not relieved itself of the obligation to shew that this was a free and voluntary confession. There was no evidence that the accused was in the vicinity where McGarvey received his injuries.

Maclean, K.C., D.A.-G., for the Crown, was not called upon.

Per curiam: The question put by the accused, "How much will the fine be?" is a strong inference that he was present when the injuries were inflicted.

The rule as to cautioning is that before the Crown introduces statements by prisoners, the onus is on the Crown to shew that there has been no inducement given to make those statements. Here there was no inducement whatever, and the learned Chief Justice stated the point clearly. The application must be dismissed.

Leave refused.

[SUPERIOR COURT OF THE PROVINCE OF QUEBEC.]

(DISTRICT OF MONTREAL.)

BEFORE DAVIDSON, J.

Re ALEXANDRE DUCLOS.

Habeas corpus—Detention in an asylum—Prisoner acquitted on account of insanity—Revised Criminal Code, sec. 969.

1. A warrant may be issued by the Lieutenant-Governor of the Province for the detention in an asylum of a prisoner acquitted on account of insanity at the time of the offence (Revised Criminal Code, sec. 969), although found sane at the time of trial.

MONTREAL, June 15th, 1907.

DAVIDSON, J.:—The return to the writ discloses that Duclos is detained by virtue of a warrant of the Lieutenant-Governor of the province, dated the 3rd of January, 1907, which declares that in conformity with section 736 of the Criminal Code, it has been certified that Alexandre Duclos, then confined in the common gaol, is insane, wherefore order is given to receive and detain him in the asylum until further ordered.

Petitioner's counsel asserts that this warrant issued without authority of law, and that Duclos, having been found sane by a special jury sworn to try that issue, and having afterwards been acquitted of the crime laid against him, was, and still is, entitled to be liberated.

When at the June (1906) term of the Court of King's Bench, Duclos came to be arraigned on a charge of shooting with intent to commit murder, counsel made a suggestion of insanity. A jury, sworn to try this issue, found that the prisoner was, owing to insanity, unable to plead and stand his trial. It was thereupon ordered that he be reconveyed to the common jail for safe keeping, until the pleasure of the Lieutenant-Governor of the province be known. That pleasure was expressed by the issuance of a warrant ordering him to be received and detained at the asylum until further ordered. In consequence of a subsequent favourable report of the medical superintendent of the asylum, Duclos was brought before the Court of King's Bench at its November term. A jury found that he was not, on account of insanity, unfit to stand his trial. There at once followed arraignment, plea of not guilty, trial and verdict of not guilty on account of insanity at the time of the offence.

Dismissing a motion for the discharge of the prisoner, the trial judge ordered that he be remanded to the common jail for safe keeping until the pleasure of the Lieutenant-Governor be known. This pleasure was a second time expressed by the warrant, now in question, of detention in the asylum.

Briefly put, the argument as to the illegality of the warrant is

that the Criminal Code of 1892 did not reproduce the section of the Revised Statutes of Canada, which authorized the issuance of a Lieutenant-Governor's warrant.

By R.S.C., ch. 174, sec. 252, which is section 736 of the Criminal Code, 1892, if a jury acquitted on account of insanity, the Court shall order such person to be kept in strict custody in such manner as to the Court deems fit, until the pleasure of the Lieutenant-Governor is known. Then immediately follows the putting of authority in the Lieutenant-Governor to intern:—

> "The Lieutenant-Governor of the province in which the case arises may, thereupon, make such order for the safe custody of such person during his pleasure, in such place and in such manner as to him seems fit." (Section 253.)

This section does not appear in the Criminal Code, 1892, at least, in direct connection with section 736.

The Revised Statute proceeds to set out by section 254, that a like order may issue in the case of any person so acquitted previous to the passing of the statute; by section 255, in the case of a person found to be insane at the time of his arraignment on trial; and by 256, in the case of a person brought up to be discharged for want of prosecution and such person appearing to be insane. These sections were reproduced in the Criminal Code, 1892, as sections 737, 738, 739.

Then follows section 257, in these words:—

> "In all cases of insanity so found, the Lieutenant-Governor may make such order for the safe custody, during pleasure, of the person so found to be insane, in such place and in such manner as to him seems fit."

The corresponding section of the Criminal Code, 1892, is 740. It reads as follows:—

> "In all cases of insanity so found the Lieutenant-Governor may make an order for the safe custody of the person so found to be insane, in such place and in such manner as to him seems fit."

This section is marked in the official copy of the statute as

being a compilation of sections 253 and 257 of the Revised Statute.

I am, and with certainty, of the opinion that the Criminal Code of 1892, in intention and in fact, makes section 740 cover all the cases referred to in 736, 737, 738 and 739. Hence, under the domain of that Code, a Lieutenant-Governor's warrant had express sanction of statutory law for its issuance as a sequence of a verdict of not guilty because of insanity at the time when the offence was committed.

The Revised Criminal Code, which came into force on the 30th of January last, by sections 966, *et seq.*, reproduces these provisions. So that the warrant continues to have the sanction of the existing law.

Mr. Laflamme strongly insists upon the right of his client to be liberated for this further reason:—"The arraignment and trial of his client, he asserts, are of themselves presumptions of sanity, and this presumption has been actually strengthened by the formal verdict of a jury declaring him sane."

"Is not then his continued and indefinite confinement in a lunatic asylum opposed to all ideas of law and justice?"

It is well that a pretension, having some initial plausibility and likely to command some popular sympathy, should not pass without a word of remark, even if it can have no effect upon this judgment. The present day English practice as to the form of the verdict to be rendered, when the crime is found to be committed during insanity, differs from ours.

In previous times, proof of madness did not entitle a man to be acquitted, but to a special verdict that he committed the offence when mad. 2 Steph. H.C.L. 151. By the Criminal Lunatics' Act, 1800, 39 & 40 Geo. III. ch. 94, sec. 1 (amended by 47-48 Vict. ch. 64), when a defence of insanity was put in, the jury had formerly specially to find whether the prisoner was insane at the time of the commission of the offence, and declare whether he was acquitted on the ground of such insanity. If they found he was insane, the prisoner was ordered to be detained during Her Majesty's pleasure. But now, by the Trial of Lunatics Act.

1883, 46 & 47 Vict. ch. 38, sec. 2, the jury, if satisfied that the accused was insane, are to find that the accused is guilty, but that he was insane at the time of the commission of the crime. Gibson & Weldon, Cr. L. 231. Arch. Cr. Pl. 183, 220. Our original statute on the subject, 14 & 15 Vict. (1851), ch. 83, was taken from the Imperial Lunatics' Act of 1800, and from 3 & 4 Vict. ch. 54. 2 Taschereau, Criminal Acts, 1869, p. 429.

The theory of the law, in either case, is that the fact of having committed the offence puts him in the class known as dangerous or criminal lunatics. It insists that there should be full subsequent observation and enquiry as to whether his delirium, or his emotional state of mental irresponsibility has run its full course, in other words, whether the lucidity of mind which justified a trial was that of an interval, or permanent. The explanation is compactly expressed in an Act relating to insane persons charged with offences in Ireland, 1 & 2 Geo. IV. ch. 33, sec. 16, which says:—

"And whereas persons . . . may have been or may be of unsound mind at the time of the committing of the offence . . . and by reason of such insanity may have been or may be found not guilty of such offence, and it may be dangerous to permit persons in such cases to go at large . . ."

This statute proceeds to give to the Court a discretion, which our Courts do not possess: "The Court . . . shall, if it be thought necessary or proper, order such person to be kept in strict custody . . . until the pleasure of the Lieutenant-Governor . . . shall be known."

It does not escape observation that from our initial statute, 14 & 15 Vict. ch. 83, down to the Criminal Code, 1892, the Lieutenant-Governor was given express power to confine "during pleasure." With the Code, the words "during pleasure," disappeared. Whether this apparently deliberate omission tends to create judicial supervision over the life of a Lieutenant-Governor's warrant, will, no doubt, have the attention of counsel.

The writ of habeas corpus is quashed, with costs.

The March number of the American Law Notes, a copy of

which counsel for petitioner has handed me, contains an interesting article on the subject of acquittal by reason of insanity, and committal without further trial. It deals mainly with constitutional aspects.

The formal judgment was entered as follows:—

"The Court having heard the parties by their counsel upon the writ of habeas corpus issued herein and having examined the proceedings and deliberated:—

"Seeing that the said Alexandre Duclos, the petitioner, is detained in the *l'Asile St. Jean de Dieu,* in the district of Montreal under and by virtue of a warrant issued by the Lieutenant-Governor of the Province of Quebec;

"Considering that said warrant is authorized by the terms of the Criminal Code, 1892, sec. 740, and by the Revised Criminal Code, 969;

"Doth quash said writ of habeas corpus with costs."

Habeas corpus quashed.

N. K. Laflamme, K.C., attorney for the petitioner.
Lamothe & Trudel, attorneys for les Sœurs de la Providence.
D. A. Lafortune, K.C., attorney for the Crown.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE RIDDELL, J., IN CHAMBERS.

THE KING v. COLAHAN.

Summary conviction—Fine—Warrant of commitment in default of payment—Tender to gaoler after office hours—Refusal—Release on habeas corpus—Reasonable time for payment—Revised Cr. Code (1906), *secs.* 739, 741.

1. Upon tender at a reasonable hour to the gaoler of the sum due under a warrant of commitment in default of payment of a fine, the prisoner is entitled to be released.

2. In the absence of statutory prison regulations on the subject, the gaoler is not justified in refusing a tender of the fine and costs made between seven and eight o'clock in the evening after his office hours.

ARGUED: April 5, 1907.
DECIDED: April 6, 1907.

MOTION by James Colahan, the defendant, upon the return of a writ of *habeas corpus* and a writ of *certiorari* in aid, for an order for his discharge from custody.

TORONTO, April 5, 1907.

J. B. Mackenzie, for the defendant.
T. L. Monahan, for the Crown.

TORONTO, April 6, 1907.

RIDDELL, J.:—A writ of *habeas corpus*, with a *certiorari* in aid, was granted in the case of James Colahan, imprisoned in the common gaol of the county of York. Upon the return, a motion was made before me for the discharge of the prisoner.

Many objections were taken to the proceedings before the committing magistrate, involving several points of more or less difficulty in the interpretation of the Criminal Code. I do not pass upon any of these objections, this not being an application to quash the conviction—as I think the application must succeed upon another ground.

Assuming the conviction to be unexceptionable, the warrant of commitment provides: "And I do hereby command you, the said keeper of the said common gaol, to receive the said James Colahan into your custody in the said common gaol, there to imprison him (and keep him at hard labour) for the term of thirty days, unless the said several sums (and costs and charges of carrying him to the said common gaol, amounting to the further sum of sixty cents) are sooner paid unto you, the said keeper." The amount of fine

was $10 and of costs $10, the whole sum to be paid being thus $20.60.

The defendant, having been apprehended under this warrant, was taken to the common gaol, and received by the gaoler on the 12th March. He thereupon, the next day, through his solicitor, requested one Spencer to raise the money and pay it. Spencer accordingly raised the sum required, $20.60, and on the 14th March, at 10 minutes before 8 o'clock in the afternoon, tendered the money to the person in charge of the gaol, the deputy keeper. He refused to receive the money, on the ground that there was a rule of the gaol that no person would or could be released, on payment of his fine after 5 o'clock in the afternoon, until the next morning. At the same time Spencer was informed that there was no use his going to offer the amount to the keeper himself (who, as he was given to understand, was not in the gaol), as this rule was in force governing all in the gaol.

It appears that this rule is not in the printed book of rules, and that nothing of the kind exists in print, except a notice in front of the gaol to the effect that "no fine will be received or bail allowed after 5 p.m."

The defendant was entitled to his liberty upon paying to the keeper, or to the person intrusted by the keeper with authority for such purpose, the sums mentioned in the warrant. The deputy keeper was clearly a person put by the keeper in his place for such purpose, and the tender was all that could be done by or on behalf of the prisoner toward payment. This tender was at a reasonable time, and the only question remaining for decision is as to the effect of the "rule."

No statutory authority exists for the imposition of such a rule, even if made by the inspector: R.S.O. 1897, ch. 321, sec. 12 (1); or if by the county council: sec. 12 (2). The power to pass regulations does not extend so far as to prevent a prisoner, through his solicitor or agent, transacting business at any reasonable time with any one—keeper or deputy keeper included.

And no common law power can, I think, be found inherent in keeper, county council, or inspector, justifying such a rule.

No doubt, full authority exists for rules and regulations for the governance of prisons and for the conduct and control of those within; but I cannot conceive of the common law vesting in any individual such arbitrary power of interference with the common law rights of the subject.

Of course, obedience to such a rule, if the rule itself be not justified, cannot be insisted upon.

In *Cobbett* v. *Grey* (1850), 4 Ex. 729, it appeared that Sir George Grey, the Secretary of State, had made certain regulations as to the removal of a certain class of prisoners from one part of the Queen's prison to another. The plaintiff came within the class mentioned, and he was, under these regulations, removed to a part of the prison in which he could not legally be confined, except under the authority of these regulations. He brought an action against Sir George Grey and the keeper of the prison. It was held by the Court of Exchequer (Pollock, C.B., Parke, Alderson, and Rolfe, BB.), that the Secretary of State had no power under the statutes to make such regulations, and held that an action of trespass lay against both defendants.

The care with which our law surrounds the liberty of the subject with every safeguard is well illustrated by that case, and also by the case of *Bint* v. *Lavender* and *Pitts* v. *Lavender* (1825), 1 C. & P. 659. The plaintiffs were imprisoned in the Worcester county gaol; the keeper of the gaol brought them to the court house in that city to be present at the hearing of an information which had been exhibited in the Crown office against them for using dogs and snares for the destruction of game: see *Davies* v. *Bint, Cooke et al.* (1824), 1 C. & P. 439. They thereupon brought an action against the keeper for false imprisonment, as he had brought them through the city of Worcester not having a writ of *habeas corpus* or Judge's order for that purpose. They obtained a verdict on consent in each case for nominal damages and full costs.

The warrant of commitment must be followed strictly; and, upon the prisoner in the present case causing the tender to be made, he should have been released.

He must be discharged.

If I have power to order that no action is to be brought against any person for the imposition of the rule mentioned or for the continued imprisonment of the applicant after the tender, I make such order.

Prisoner discharged.

[SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE IRVING, J.

THE KING v. SPUZZUM.

Evidence—Complaint in case of rape—Questions put to complainant by a relative on the following day—Admissibility—Revised Cr. Code (1906) secs. 298, 299.

1. Where the complainant makes a statement, to a third party, not in the presence of the accused, such statement may be given in evidence, provided it is shewn to have been made at the first opportunity which reasonably offered itself after the commission of the offence, and has not been elicited by questions of a leading and inducing or intimidating nature.

Criminal trial at the Fall Assizes, 1906, held at New Westminster.

On the trial of the accused for rape, the Crown offered as a witness the complainant's aunt, who, in consequence of reports which she had heard, had gone to the complainant's house on the afternoon of the day after the alleged rape had been committed and had put to her a certain question. The complainant was about sixteen years of age living in her father's house with a brother aged eight and a sister aged four. The mother was dead. Prisoner broke into the house at night during the father's absence, and committed the offence. In the morning of the next day the complainant went to her aunt's house and there told a cousin, aged nine, that the house had been broken into, but to

this child she made no mention of the rape. The girl's aunt, who was not at home when the girl called, having on her return, been told that a man had broken into the house, immediately went to the complainant's house and asked her "what was the trouble."

W. Myers Gray, for the accused, objected to the admission of this evidence, on the ground that anything the complainant said in answer to questions was conversation and not a complaint. He cited *The Queen* v. *Lillyman,* [1896] 2 Q.B. 167; *Reg.* v. *Merry* (1900), 19 Cox C.C. 442, and *Rex* v. *Osborne* (1905), 74 L.J.K.B. 311.

McQuarrie, for the Crown.

NEW WESTMINSTER, October 23, 1906.

IRVING, J., held that, in view of the discretion which, as decided by *Rex* v. *Osborne* (1905), 74 L.J.K.B. 311, the trial Judge has to admit or reject evidence under similar circumstances, and it not appearing that the question asked by the aunt in this case was of a suggestive or leading character, he would admit the evidence.

Evidence admitted.

[The accused was, on the whole evidence, convicted and sentenced to imprisonment for life.]

Note: *Rape—Complaint of prosecutrix—Evidence.*

In *R.* v. *Osborne* (1905) 74 L.J.K.B. 311, [1905] 1 K.B. 551 the prisoner was indicted for an indecent assault on a girl under the age of thirteen years whose consent to the act was, therefore, immaterial. At the trial evidence was admitted of the answer given by the girl to a question put by another child in the absence of the prisoner as to why the girl had not waited for the other child at the prisoner's house. On a Crown case reserved it was held that the evidence was admissible, not as evidence of

Note—*Continued.*

Rape—Complaint of prosecutrix—Evidence.

the truth of the charge alleged, but as corroborating the credibility of the girl and as evidence of the consistency of her conduct. (Lord Alverstone, C.J., Kennedy, Ridley, Channell and Phillimore, JJ.).

Mr. Justice Ridley, in delivering the judgment of the Court, quotes Hale's Pleas of the Crown, vol. I. 633, where it is stated as to the offence of rape that the party ravished is to give evidence on oath and her credibility must be left to the jury: "for " instance, if the witness be of good fame, if she presently dis- " covered the offence, made pursuit after the offender, shewed " circumstances and signs of the injury, ... , these " and the like are concurring evidences to give greater pro- " bability to her testimony when proved by others as well as her- " self. But on the other side, if she concealed the injury for " any considerable time after she had opportunity to com- " plain, ... and she made no outcry when the fact was " supposed to be done, when and where it is probable she might " be heard by others, these and the like circumstances carry a " strong presumption that her testimony is false or feigned."

The Court for Crown cases reserved adopted the above quotation from Hale as a correct statement of the law, and approved of the following comment thereon made by the Supreme Judicial Court of Massachusetts in *Commonwealth* v. *Cleary* (1898) 172 Mass. 175:—"The evidence is not admitted " as part of the res gestæ, or as evidence of the truth of the " things alleged, or solely for the purpose of disproving con- " sent, but for the more general purpose of confirming the testi- " mony of the ravished woman. See *Reg.* v. *Lillyman*, [1896] " 2 Q.B. 167, 170, 177."

The judgment of the Court in the *Osborne case* concludes with the following statement:—

> "It is only to cases of this kind that the authorities on which our judgment rests apply; and our judgment also is to them restricted. It applies only where there is a complaint not elicited by questions of a leading and inducing or intimidating character, and only when it is made at the first opportunity after the offence which reasonably offers itself. Within such bounds we think the evidence should

Note—*Continued.*

Rape—Complaint of prosecutrix—Evidence.

be put before the jury, the judge being careful to *inform the jury*, that the statement is not evidence of the facts complained of, and must not be regarded by them if believed as other than corroborative of the complainant's credibility, and, when consent is in issue, of the absence of consent."

[SUPREME COURT OF THE NORTH-WEST TERRITORIES.]

BEFORE SIFTON, C.J., WETMORE, SCOTT, NEWLANDS, HARVEY AND JOHNSTONE, JJ.

THE KING v. STANDARD SOAP COMPANY.

Lottery—Proceedings against corporation—Serving notice of charge—Leave of Attorney-General to prefer charge—Formal charge in lieu of indictment—North-West Territories Act—Province without grand jury system—Revised Cr. Code, secs. 236, 619, 873, 918, 983.

1. In the Province of Alberta which has no grand jury system, a corporation may be compelled to answer to an indictable offence (*ex gr.* conducting a lottery scheme) by a formal written charge in lieu of an indictment, such charge being laid by the Attorney-General or by his direction or with the consent or order of a Judge and notice thereof being served on the corporation under section 918 of the Revised Code.

DECIDED: April 30, 1907.

Crown case reserved by STUART, J., for the opinion of this Court, under sec. 1014 of the Criminal Code, R.S.C. 1906, as follows:—

"On 15th March, 1907, Mr. James Short, agent for the Attorney-General, and Crown prosecutor for the Calgary Judi-

cial District, appeared before me in open Court, and applied under sec. 873, sub-sec. 2, of the Criminal Code, 1906, for an order that a charge be preferred by him before the Court against the Standard Soap Company, Limited, a corporation, for a violation of the provisions of sec. 236 of the Code. The defendant corporation were not represented on this application. The material upon which the application was made, and the sufficiency of which is not now in question, consisted of certain depositions taken upon a preliminary investigation of a charge under the same section of the Code against the secretary of the corporation personally, upon which the magistrate had refused to make a committal for trial, and also of an affidavit of the agent of the Attorney-General stating that he had good reason to believe, and did believe, that the defendant corporation were guilty of the offence alleged, and to which affidavit a letter from the Deputy Attorney-General for Alberta was attached as an exhibit. This letter is as follows:—

Department of the Attorney-General,
Edmonton, Alberta,
March 11th, 1907.

James Short, Esq.,
Agent Attorney-General,
Calgary, Alta.

You are hereby authorized to prefer a charge against the Standard Soap Company, before the Supreme Court of the North-West Territories in the Judicial District of Calgary, for that the said company did in the city of Calgary, in the Province of Alberta, in or about the month of June, 1906, and on divers times thereafter during said year, unlawfully conduct a certain scheme for the purpose of determining the holders of what lots or tickets were the winners of certain property, to wit, a piano, a Gurney Oxford Chancellor range, a baby carriage, and other articles,

proposed to be given or disposed of by a mode of chance, contrary to the statute in such cases made and provided.

S. B. Woods,
Deputy Attorney-General.

"I granted the following order:—

"Upon the application of James Short, agent for the Attorney-General for the Province of Alberta, upon hearing what was alleged by said James Short, upon reading the direction of the Deputy of said Attorney-General, and the depositions taken at the preliminary inquiry in the case of the King against Frederick T. Weir, which depositions were filed this 15th day of March, 1907:—

"This Court doth order the said James Short, agent for the Attorney-General, to prefer a charge before this Court, being the Supreme Court of the North-West Territories, Judicial District of Calgary, now sitting at Calgary aforesaid, against the said Standard Soap Company, Limited, as follows:—

"Canada,	The King
"Province of Alberta,	v.
"Judicial District of Calgary	The Standard Soap Company,
To wit:	Limited.

"The Standard Soap Company, Limited, stands charged before the Honourable Charles A. Stuart, a Judge of the Supreme Court of the North-West Territories, Judicial District of Calgary, at the city of Calgary, in said Judicial District, this 15th day of March, 1907:—

"For that the said the Standard Soap Company, Limited, did in the city of Calgary, in the Province of Alberta, in or about the month of June, 1906, and on divers other times thereafter during said year, unlawfully conduct a certain scheme for the purpose of determining the holders of what lots or tickets were the winners of certain property, to wit, a piano, a Gurney Oxford Chancellor range, a baby carriage, and other articles, proposed to be given or

disposed of by a mode of chance, contrary to the statute in such cases made and provided.

James Short,
Crown Prosecutor,
Agent for the Attorney-General.

"Judicial District of
"Calgary,
"L.J.C.

"Dated at Calgary this 15th day of March, 1907.

By the Court,
Laurence J. Clarke,
Clerk of Court.

"Chas. A. Stuart,
"J.S.C.

"A charge was forthwith prepared and signed by the agent of the Attorney-General and filed in Court. The Court was then adjourned to allow the proper notice to be served on the defendant corporation, as provided by sec. 918 of the Code, R.S.C. 1906. A notice was accordingly duly served upon the secretary of the defendant corporation, and on 30th March the defendant corporation appeared in Court in pursuance of the notice, by their attorney, one F. T. Weir. The charge was then read, and, instead of pleading thereto, the defendant corporation by their counsel, Mr. Nolan, applied for time to demur to the charge. This application was granted, and on 3rd April the defendant corporation by their counsel filed a written demurrer, to which the agent for the Attorney-General filed a rejoinder.

"The ground taken by the counsel for the defendant corporation in support of the demurrer was that a bill of indictment could not be preferred before any Court under the section in question except before a grand jury as part of the Court, and that, as there is no grand jury in the Provinces of Saskatchewan and Alberta, there was no authority to make the order in question.

"After hearing argument for the defendant corporation and for the Crown I was of opinion that the demurrer should be sustained, and therefore dismissed the charge.

"The question reserved for the opinion of the Court *en banc*

is: Should the demurrer have been sustained upon the grounds taken in support thereof? If this question is answered in the affirmative, the charge will stand dismissed; and if answered in the negative, the defendant corporation will be required to appear at the next sittings of the Court, at Calgary, and plead to the said charge, and stand their trial thereon."

James Allan, for the Crown.
P. J. Nolan, for the defendants.

REGINA, ALTA., April 30, 1907.

The judgment of the Court was delivered by

NEWLANDS, J.:—The North-West Territories Act, ch. 50, R.S.C. 1886, sec. 65, provided that the procedure in criminal cases shall, subject to any Act of the Parliament of Canada, conform as nearly as may be to the procedure existing in like cases in England on the 15th day of July, 1870; but no grand jury shall be summoned or sit in the Territories. This Act was amended by 54 & 55 Vict. ch. 22, sec. 11, which provided that, in lieu of indictments and forms of indictment as provided by the Criminal Procedure Act, the trial of any person charged with a criminal offence in the North-West Territories shall be commenced by a formal charge in writing setting forth as in an indictment the offence wherewith he is charged.

When the Criminal Code, 1892, was enacted, it was, by sec. 983, made applicable to the North-West Territories, except in so far as it was inconsistent with the provisions of the North-West Territories Act and the amendments thereto. As far as this case is concerned, the only changes made in the Code by that Act are that instead of an indictment being presented by a grand jury to the Court where a person is charged with a criminal offence, the proceedings are commenced by a charge in writing setting forth the offence in the same manner as in an indictment.

When the Provinces of Saskatchewan and Alberta were formed by the Saskatchewan and Alberta Acts, the North-West Territories Act ceased to apply to them, as by the North-West Territories Amendment Act passed at the same session of the Parliament of Canada, and which came into force on the same day as the Saskatchewan and Alberta Acts, namely, 1st September, 1905, the words "North-West Territories" used in that Act were changed to mean only the territory north of those Provinces and the Province of Manitoba, excepting the Yukon Territory, but it was by the Saskatchewan and Alberta Acts expressly provided that all laws, so far as they were not inconsistent with anything contained in those Acts, or where those Acts contained no provision intended as a substitute therefor existing immediately before the coming into effect of those Acts in the Territories thereby established into Provinces, should continue in those Provinces as if those Acts had not been passed. As no change was made by those Acts in the procedure in criminal cases, the laws relating thereto continued as before, and there has been no change made since, so that criminal prosecutions are commenced in the same manner as when the North-West Territories Act was in force.

It was argued by Mr. Nolan that, because ch. 50, R.S.C. 1886, had been repealed by the R.S.C. 1906, there was now no law in force excepting the Criminal Code, but, as I have shewn, that Act ceased to affect these Provinces after the passing of the Saskatchewan and Alberta Acts, so that the repeal of ch. 50, R.S.C. 1886, could have no effect upon the laws of these Provinces. It therefore only remains for me to see that the procedure provided by the Criminal Code, as altered by the North-West Territories Act, has been followed in this case. It is unnecessary to consider the procedure in ordinary criminal cases, because it has been held that the same proceedings cannot be taken against a corporation as against an individual, they not being subject to a preliminary examination before a magistrate as an individual.

Robertson, J., in *Re Chapman and City of London*, 19 O.R. 33, at p. 38, says:—

> "I am clearly of opinion that the justice has no jurisdiction in this matter; he cannot compel the corporations, or either of them, to appear before him; should he summon them, they need not obey; should they not obey, he cannot issue a warrant to bring them or either of them before him: although they and each of them are a corporate body, yet their 'body' cannot be taken into custody, and the justice has no power to proceed *ex parte*. The accused must be before the Court when the testimony is given, and the procedure points out what is to be done when the accused does appear, etc. Nor can he, the justice, commit, or detain in custody, nor can he bind over to appear and answer to an indictment; that being so, he has no jurisdiction to bind over the prosecutor, or person who intends to present the indictment, etc."

This decision was followed by a Divisional Court in *Regina* v. *City of London*, 32 O.R. 326, and I see no reason why it should not be followed by this Court. This disposes of the argument of Mr. Nolan that the company in this case were brought before the Court without a preliminary examination.

They, therefore, must be proceeded against by one of the methods set out in sec. 873 of the Criminal Code, R.S.C. 1906. This section makes it clear that no one but the Attorney-General, or some one by his direction or with the consent or order of a Judge, may prefer an indictment unless preceded by a preliminary examination before a magistrate.

Now, as it is provided by the law in force in the Provinces of Saskatchewan and Alberta that there shall be no grand jury, and that a formal charge shall be laid in lieu of an indictment, it follows that this section is complied with by a formal charge in writing being laid either by the Attorney-General, or by some one under his direction, or with the consent or order of a Judge,

and the corporation must appear by attorney and plead or demur thereto as provided by sec. 619, R.S.C. 1906. In this case the offence was committed in the Province of Alberta, and Mr. Short, by direction of the Attorney-General for that Province, obtained an order from a Judge to lay the charge, and a formal charge in writing was presented to the court.

Section 873 of the Code, as altered by the North-West Territories Act, and continued in force, is therefore fully complied with, and the learned Judge should not have sustained the demurrer on the grounds taken in support thereof, and the question submitted for the opinion of the Court should therefore be answered in the negative.

Demurrer overruled.

[SUPERIOR COURT OF THE PROVINCE OF QUEBEC.]

(DISTRICT OF MONTREAL.)

BEFORE LAFONTAINE, J.

Re LACROIX.

Vagrancy—Summary conviction—Omission to reduce evidence to writing—Defect not one of form only—Cr. Code (1892) *secs.* 590, 856, 896—*Revised Cr. Code* (1906) *secs.* 682, 683, 721, 1129.

1. In matters of summary conviction falling under the Criminal Code the depositions must be taken in writing, otherwise the conviction will be quashed.
2. The irregularity is not a mere defect of form and is not cured by sec. 1129 of the Revised Code.

DECIDED: February 7, 1907.

The petitioner, J. P. Lacroix, had been sentenced on the 4th January, 1907, by Recorder Weir to two months' imprisonment,

$20 or two other months, for vagrancy, as provided by articles 207-208 of the Criminal Code, 1892.

In his petition granted by Mr. Justice Davidson, for the issue of the writ of certiorari, the petitioner alleged that he had been irregularly condemned, because the witnesses' depositions had not been taken down in writing, as required by law.

MONTREAL, February 7, 1907.

L. Houle, for the petitioner referred to *Denault* v. *Robida,* 8 Can. Cr. Cas. 501; *R.* v. *McGregor* (1905), 10 Can. Cr. Cas. 313; Tremeear's Criminal Code, p. 735. The statute 62 Vict. (Que.) ch. 58, sec. 500, dispenses with the Recorder's Court taking down in writing the depositions in cases that fall under a penal, but not a criminal, statute. Section 503 of the same statute specially ordains that the provisions of the Criminal Code, 1892, Part LVIII., shall apply to the Recorder's Court. Section 856 in Part LVIII. refers to article 590 of the Code (Revised Code, secs. 682 and 683) which requires that the depositions be taken in writing.

O. Lavallée, for the City of Montreal, *mis-en-cause,* contra.

MONTREAL, February 7, 1907.

LAFONTAINE, J., rendered the following judgment:—

"The Court, after having heard the parties by their attorneys on the merit of the writ of certiorari issued in this case, examined the procedure, the exhibits fyled and the proof;

"Whereas the case in which the petitioner has been condemned to two months and to a fine of $20 and, in default thereof, to an imprisonment of two months is not an action taken for the recovery of a sum or the imposition of a fine or penalty, but is a case for punishment of an offence liable to prosecution by information or complaint, and that section 500 of the Montreal

charter which prescribes that it is not necessary in the cases therein mentioned to take the depositions in writing does not apply to the charge against the petitioner;

"Whereas clause 503 of the charter expressly decrees 'that in other than civil cases, the provisions of the Criminal Code of 1892 must apply generally to proceedings taken before the Recorder's Court, and whereas in accordance with the provisions of the Criminal Code, the proof must be taken in writing (art. 856-590);

"Whereas it is admitted, and it further appears by the record, that the proof against the petitioner has not been taken in writing and that there is therefore a serious and essential omission causing prejudice to the accused, and not one of the informalities or defects in form mentioned in article 896 of the Criminal Code (*Denault* v. *Robida*, 8 Can. Cr. Cas. 501);

"The Court maintains the certiorari and cancels the conviction with costs against the City of Montreal, as it has contested the writ of certiorari, and orders the liberation of the accused."

Conviction quashed.

Note: See note vol. 10 Can. Cr. Cas. 314, 315.

[SUPREME COURT OF NEW BRUNSWICK.]

BEFORE TUCK, C.J., AND HANINGTON, LANDRY, McLEOD AND GREGORY, JJ.

THE KING v. CLARKE.

Attempt to commit rape—Duty of judge to reject inadmissible evidence—Identity of party charged—Description—Rebuttal testimony—Proving contradictory statement by witness—Proving complaint to police officers—Rev. Canada Evidence Act (1906) *sec.* 11—*Revised Cr. Code* (1906) *secs.* 268, 951.

1. It is the duty of the trial judge in a criminal case to exclude inadmissible evidence, and its admission is a ground for a new trial whether objected to or not on the trial.
2. Whether or not the conditions required by section 11 of the Revised Evidence Act, 1906, formerly sec. 107 of the Criminal Code, 1892, to justify the admission of rebuttal testimony contradicting a witness who has denied making an alleged statement to a third party at variance with her testimony, have been fulfilled, is a question for the presiding judge, and, if reasonably exercised, is not a ground for a new trial on a case reserved.
3. On the trial of an indictment for an attempt to commit rape statements of the person assaulted, and of her companion present at the beginning of the assault, made to police officers, some four hours after the assault, that they had given a description of the assailant, but not stating what the description was, and evidence of the officers that in consequence of such description they had looked for the assailant were properly received, although statements of a like character had previously been made to other persons.
4. Where the prosecutrix on cross-examination had stated that she had given a description of her assailant in the presence of her father, and that in consequence of such description her father had suspected a person other than the prisoner, the Crown was properly allowed to prove by the father what the description was that his daughter had given in his presence.
5. On the trial of an indictment to commit rape if the only issue involved is as to the identity of the prisoner, it is unnecessary for the trial judge to point out to the jury that the law permits the finding of a lesser offence than the one charged.

ARGUED: December 18, 1906.
DECIDED: January 11, 1907.

THIS is a crown case reserved after conviction of an attempt to commit rape, tried before Mr. Justice Landry at the Saint John Circuit in September, 1906.

The case reserved was submitted to the Court in the words following:—

1st. After the wife of the prisoner had concluded her testimony, I permitted her to be re-examined at her home in the presence of both counsel, and this took place: "The Attorney-General. Q. Did you not on Sunday, the 5th of August last,

at your house, tell policeman Greer that 'your husband was working all day Saturday?' A. No, I did not."

2nd. I permitted officer Greer to be called in rebuttal to this answer of Mrs. Clarke. In so doing I believed that Mrs. Clarke could not be mistaken as to the particular occasion, the 5th of August, at her house. In the exercise of my discretion in this matter, I believed I could use knowledge obtained on the former trial, as well as the knowledge gained on this, and I was sure that Mrs. Clarke knew what occasion was referred to by the Attorney-General. On the former trial she had been asked very minutely as to the conversations with officer Greer on the 5th of August at her home, and her recollection seemed distinct as to the occurrences of that day.

3rd. I admitted the statements of May Short and Ethel Train to police officers. These statements were only general, such as: Did you describe the man, the coat, the boots, the moustache, the clothes? I did not permit them to state what description they gave, but only to state that they had given descriptions. Neither of them was asked by the prosecution as to any description given by them to Louis Train. In the cross-examination, Mr. Baxter asked:—

"Q. As a matter of fact, did you not know of your father sending a message to some of the police that there was some other man who had assaulted you? A. Yes, sir."

"Q. Do you know what man it was your father said? A. I do not."

"Q. From the description you gave your father he picked out another man. A. Yes."

The statements that I allowed Louis Train to make are set forth on pages 81 to 84 of the case.

4th. I admitted the evidence of police officers Corbett, Jenkins, Caples and Greer in a general way, only nothing further than to state that descriptions had been given to them, and with such descriptions they had looked for the man.

5th. I do not accede to the statement that I charged the jury

that there was a presumption against the truth of a prisoner's testimony. I had no such intention.

6th. I do not agree to the statement that I charged the jury without qualification, that the only inference to draw from the evidence was that an attempt at rape had been committed.

7th. I omitted to tell the jury, in so many words, that the law permitted them, if the facts justified it, to find an offence less than the one charged.

The questions referred are, as to whether I was right in the decisions I gave on the points involved in the above.

FREDERICTON, N.B., December 18, 1906.

Baxter moved to quash the conviction, and for a new trial. On the point of allowing officer Greer to be called in rebuttal of the evidence of the prisoner's wife denying that she had stated that her husband had worked all day Saturday, the day the crime was committed. (Pugsley: I wish to call the attention of the Court to the fact that there was no objection to this evidence.) I am almost sure there was, but it is not material, for the objection is open to me whether it was taken at the trial or not.

[Hanington, J.: I should like you to refer to the authority for that proposition.]

Baxter.—In a criminal case it is the duty of the Judge to refuse to admit illegal evidence whether the counsel objects or not. See *The King* v. *Long*, 5 Can. Cr. Cas. 493; the *King* v. *Brooks*, 11 Can. Cr. Cas. 188; *Reg.* v. *Saunders* (1899), 1 Q.B. 490. [Court: The objection is open to you.] The time, place and circumstances of the supposed statement was not sufficiently particularized, and it was not material to the case and therefore could not be rebutted. 2 Wigmore on Evidence, sec. 1038; *Attorney-General* v. *Hitchcock*, 1 Ex. 91; *Reg.* v. *Brown*, 21 U.C. Q.B. 330, at page 334.

[Landry, J.: I was, and am satisfied that Mrs. Clarke was fully apprised of the circumstances.]

Baxter.—The statements of May Short and Ethel Train made to the police and to Louis Train as to the description of the assailant should not have been admitted. Such statements if admissible at all are only so by reason of being a part of the *res gestæ*. The statements in question were not the first made, and were too late. *Reg.* v. *Lillyman* (1896), 2 Q.B. 167; *Reg.* v. *Merry,* 19 Cox 442; *Reg.* v. *Graham,* 3 Can. Cr. Cas. 22. The evidence of Louis Train was not admissible under any circumstances. If I am right in this a new trial must follow. Section 746 of the Criminal Code does not in its true construction empower the Court to affirm a conviction where the evidence submitted to the jury is inadmissible and may have influenced the jury merely because there was other evidence properly admitted sufficient to warrant a conviction. *Makin* v. *Attorney-General N.S.W.* (1894), A.C. 57; *Reg.* v. *Theriault,* 32 N.B.R. 504, per Barker, J., at page 515; *Charnock* v. *Merchant,* 19 Cox 443; *Bray* v. *Ford* (1896), A.C. 44; *Reg.* v. *Gibson,* 18 Q.B.D. 537, other grounds are under the head of misdirection.

[Landry, J.: I think I should state here that I am satisfied that what I said to the jury on that branch of the case is not correctly reported.]

Baxter.—I admit that the report is very inaccurate and unsatisfactory, but on reference to my own notes I find what leads me to conclude that your Honour in effect stated to the jury that there was a presumption against the truth of the prisoner's testimony.

[Landry, J.: I certainly never intended to make any such statement, and I do not see how it is possible that I could have conveyed any such impression.] [Tuck, C.J.: Then those points are not reserved?] [Landry, J.: I could not reserve the points on the statements as reported.]

Baxter.—Then I will leave that and take up the point of non-direction. I submit the Judge in his charge should have defined the offence and explained the minor offences for which the jury might convict. Failure to do this is ground for a new trial,

though he was not asked to do so at the trial: *The King* v. *Wong On*, 8 Can. Cr. Cas. 423.

Pugsley, A.-G., supported the conviction. Whether the circumstances of the particular occasion at which the statement was made were sufficiently designated and brought to the attention of the party proposed to be contradicted to satisfy section 701 of the Criminal Code is a question for the discretion of the presiding Judge, and if reasonably exercised will not be interfered with on appeal: *Reg.* v. *Woods*, 2 Can. Cr. Cas. 159. [Tuck, C.J.: It does not strike me there is much in that branch of the case, but I am a good deal impressed with the contention that the evidence of Louis Train complained of, was improperly admitted.]

Pugsley.—That appears to me to be the strength of the prisoner's case. In discussing the right of the Crown to give this evidence it must be looked at from the stand point of the circumstances that led up to its being offered. It must be borne in mind that the prisoner's counsel had asked Ethel Train if she had not made a statement in the presence of her father, and if in consequence of what she had said he had not suspected some person other than the prisoner, and had received replies in the affirmative. It seemed to me as Crown officer, that it was my duty to shew what that statement was to prevent the prisoner's counsel from asking the jury to infer that she had made a statement at variance with her testimony or with statements she had been proved to have made to other persons particularly, as the only issue involved in the case was the identity of the assailant. If the Court should come to the conclusion that this or other evidence was improperly admitted, that does not in itself constitute a sufficient ground for a new trial. The question is, was there under all the circumstances a substantial wrong or miscarriage within the meaning of section 746 of the Code? I submit the jury, as reasonable men, must have convicted if none of the objectionable evidence had been offered and that their decision could not have been based on, or influenced by it. See *Reg.* v. *Woods*, 2 Can. Cr. Cas. 159. The doctrine laid down in the

case of *The King* v. *Wong On*, 8 Can. Cr. Cas. 423, is not applicable to this case. There was here no question as to the offence. It was never suggested at the trial, but that if the prisoner was the assailant, he was guilty of the offence charged in the indictment. The Judge could not properly have said to the jury if, under the evidence, you are satisfied that the prisoner is the man who made the assault, you may convict of the offence charged, or of an indecent assault, or a common assault. If this is so, what possible reason can there be for requiring the Judge to explain to the jury that they may convict for those offences. It is only where the evidence would in some phase justify a conviction for a lesser offence than that charged that the failure to thus direct is a ground for a new trial.

Baxter in reply.

FREDERICTON, January 11, 1907.

TUCK, C.J.:— At the September Circuit Court (1906), holden for the city and county of Saint John, the prisoner, William E. Clarke, was convicted, that he did, on the 4th day of August then last past, unlawfully commit an assault upon Ethel P. Train, a young girl, at that time thirteen years and eleven months old, with intent to commit upon her person the crime of rape.

I have read the evidence given at the trial, and have, without hesitation, come to the conclusion that the testimony was ample to justify the verdict of "guilty" found by the jury. Ethel P. Train and May Short, who was with her at the time of the assault, swore positively as to the appearance of the man, and their identification of him was complete. They described his facial appearance, the stoop in his back, the clothes he wore, the rent in the back of his coat, his canvas shoes, and other details, all of which pointed to the prisoner as the person who committed the crime.

If the evidence of the prisoner and his wife, Ada Clarke, is to be believed, the prisoner was not on the Milledgeville road

(where the assault is sworn to have been made) at all on Saturday, the 4th day of August; that he was not within miles of it, and that he never saw the girls, Ethel P. Train and May Short, until the next day (Sunday), which was after he had been arrested, and then he saw them in the office of the chief of police.

Beyond doubt, the jury had the right to believe the evidence given on behalf of the Crown, and to disregard that of the prisoner and his witnesses.

At the end of the trial, and after a verdict of guilty had been rendered, Mr. Baxter, for the prisoner, asked to have a case reserved. This was acceded to by the learned Judge before whom the cause was tried. While the learned Judge had doubts on only one point, he reserved all the grounds taken by the prisoner's counsel. They are chiefly on the improper admission of evidence. I take the grounds from the report of the learned Judge; and, first, he says:—

> "After the wife of the prisoner had concluded her testimony I permitted her to be re-examined at her home in the presence of both counsel, and this took place: The Attorney-General—Q. Did you not, on Sunday, the 5th of August last, at your house, tell policeman Greer that your husband was working all day Saturday? A. No; I did not."

The learned Judge allowed officer Greer to be called to rebut this answer of Mrs. Clarke. In doing so, I think the Judge exercised a wise discretion. He gives his reason as follows:—

> "I believed that I could use knowledge obtained on the former trial as well as the knowledge gained on this, and I am sure Mrs. Clarke knew what occasion was referred to by the Attorney-General. On the former trial she had been asked very minutely as to the conversation with officer Greer on the 5th of August at her home, and her recollection seemed distinct as to the occurrences of that day."

I have no objections to make to the reasons, and think that the evidence was properly admitted.

Statements of May Short and Ethel P. Train to police officers were also admitted. As to these statements the learned Judge

says: "They were only general, such as: Did you describe the man, the coat, the boots, the moustache, the clothes? I did not permit them to state what descriptions they gave, but only to state that they had given descriptions." Had I been the presiding Judge, and had the Attorney-General urged it, I would have gone further and allowed the girls to state what description they gave. It seems to me, that in the interest of good police government, and that criminals may be apprehended, it is absolutely essential that police officers should get, where it is possible, a description of the person who committed the alleged crime. Otherwise many a criminal might not be arrested. If, then, a witness may be asked if he gave a description, why may he not also state what description he gave? I can see no objection to such evidence, more especially where the description is given very soon after the commission of the crime.

The same reasoning applies to the admission of the evidence of police officers Corbett, Jenkins, Caples and Greer, who were allowed to state the descriptions given them, upon which they looked for the man.

The next objection to the admission of evidence, and really the most important, and the only one as to which the learned Judge had any doubt at the trial, is to the questions put to Louis Train, the father of Ethel, and the answers. It appears that on cross-examination Mr. Baxter put this question to Ethel Train:—

> "Q. As a matter of fact, did you not know of your father sending a message to some of the police, that there was some other man who had assaulted you? A. Yes, sir."
>
> "Q. Do you know what man it was your father said? A. I do not."
>
> "Q. From the description you gave, your father picked out another man? A. Yes."

In consequence of this evidence given on cross-examination of Ethel Train, the Attorney-General was allowed to put the following questions to Louis Train. I give the questions and answers:—

"Q. When did your daughter first give a description, in your presence, of the man who assaulted her? A. It was in the evening when the officers were in the house. That was Saturday evening, the same evening as the day she had been assaulted."

"Q. What time of the evening was it? A. I do not remember, but I think it was somewhere round eight or half past."

"Q. Your daughter was upon the stand yesterday, and, in answer to my learned friend, Mr. Baxter, stated from the description which your daughter gave of the man who made the assault that you thought it answered to the description of another person? A. I made the remark to that effect."

"Q. I want you to tell it slowly and distinctly the description which your daughter gave of the man and his clothing?"

After objection had been made to this question, and it had been allowed, with the expression of the Judge of some doubts, the Attorney-General put the following:—

"Q. What was the description which your daughter gave of the man? A. She said he was a middling large man, a kind of a dark, sandy moustache, and his cheek-bones were kind of high and kind of red-faced. She said the gentleman had a kind of dark blue suit on; he had canvas shoes with leather straps, toe taps and leather across the instep, and I think she said he had a hard hat on, and she spoke about a tear in the back of the gentleman's coat, either under the arm or below the shoulder, and I think she said he wore a kind of Dewey collar; I do not know whether it was a stand-up or turn-down, but a kind of double collar. I think they call them Dewey collars."

"Q. From that description you thought it might apply to some person whom you named? A. I did at the time."

"Q. Did you know Clarke at that time? A. No, the first time I saw Mr. Clarke was when I came up to the station the following Sunday with the two little girls."

"Q. Who did you think it might be? A. I had been working out in Millidgeville previous to that, and only got through Saturday before this happened, and I was working for Alderman MacRae, and a man named Cunningham was putting up a barn for Mr. MacRae, and he had a man—whether it was one of Mr. Cunningham's sons or another man he had working for him I could not say."

He then said something about being excited and worried, which is not material, and then he continued:—

"As I was saying that night, being upset and excited, I would jump at any wild theory, and I mentioned about this man who had been working with Mr. Cunningham on Mr. MacRae's barn, but I understood afterwards." (Objection.)

"Q. Had you any conversation with this man before? A. No more than I would see him coming through the field to his work, and he may have passed the time of day. I do not know his name yet, if he is not a Mr. Cunningham."

"Q. Do you know as to whether or not there was anything in that man's speech, or had you a talk with him yourself? A. The few remarks we did have he had a kind of stutter in his speech."

"Q. Did you ask Ethel as to whether the man who assaulted her had a stammer in his speech? A. Yes."

"Q. What did she say? A. She answered no, he did not; he talked all right."

"Q. There were no steps taken to arrest the man? A. Not that I know of."

"Q. I want you to look at this coat? A. That looks very much like the coat the prisoner had on that Sunday afternoon that I took the little girl up."

The witness is then asked a number of questions as to the clothes the prisoner wore on Sunday as compared with clothes produced in Court. He says also that he never saw the prisoner until he saw him in the guard-room after he had been arrested. This is all the evidence of Louis Train, which has in any way

relation to the case reserved. It was offered and received chiefly, if not entirely, because of the questions put to Ethel Train on cross-examination.

What the Crown wished to shew was that the description Ethel gave to her father on the Saturday was substantially, and, in effect, the same as that she gave in Court at the trial. Mr. Baxter's object was to impress the learned Judge and jury with what he would argue must be the fact, that she had given a different description to her father from that which she had given in Court, and this had led her father to suspect another man. If the father had not been called, and no evidence had been given as to what description the daughter did give to him on the Saturday, one with experience in the Courts can readily see with what startling effect the prisoner's counsel would have urged this telling circumstance to the jury, and would probably have gone further and said how easy and how entirely right it would have been for the Crown to have called the girl's father to shew just what description of the man she had given.

Having had at first some doubts as to the admissibility of this testimony, I think now that the Attorney-General would have been almost derelict in his duty, had he not called Louis Train, and asked him the questions to which objection has been taken. To my mind the objection to this testimony goes rather to its force than its admissibility. I can understand counsel arguing forcibly before a jury that they ought not to give weight to this evidence of Louis Train, because he had got one description from his daughter on the Saturday night, and got the other one from the testimony she gave in Court. But, it seems to me, that the objection just named goes rather to the weight of the testimony than to its admissibility.

Again, it may be said, that if this evidence is bad in itself, no cross-examination of Ethel Train by Mr. Baxter can make it good. I have no doubt that the learned Judge would have rejected Louis Train's evidence, to which objection is made, had it not been for the previous cross-examination. But, in my opinion, that (the question on cross-examination of Ethel Train) made it

imperative upon him to receive it. What otherwise might have been improper evidence is rendered necessary and proper by the circumstances of this case.

But, even if this and other evidence was improperly admitted, I think under section 746, sub-section (*f*) of the Criminal Code, 1892, there should not be a new trial, but that the conviction ought to stand. This section provides, "that no conviction shall be set aside, nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial, or some misdirection given, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage was thereby occasioned on the trial."

If it were necessary to rely on section 746 of the Criminal Code (and with my view it is not), I should think that this case is fully covered by the proviso. I have carefully read the charge of the learned Judge, and think that there is no misdirection. There is certainly none which could have misled the jury. The Judge stated at the argument before this Court, as it is also stated in the case reserved, that he did not charge the jury that there was a presumption against the truth of a prisoner's testimony; that he did not, without qualification, charge the jury, that the only inference to draw from the evidence was, that an attempt at rape had been committed. Take the evidence altogether, or take any part of it, I think it would have been absurd to have asked the Judge or to think that he ought to have charged the jury, that they might find the prisoner guilty of an offence less than the one charged in the indictment. The prisoner was either guilty as charged, or he was not guilty at all, as he swore. There was no common assault about it. Under the evidence he might have been found guilty of rape, but not of common assault. I think the conviction must be affirmed.

LANDRY, J.:—The indictment contained but one count, that was for an attempt to commit rape. The proof of the commission of the crime and of the identity of the prisoner was ample: free

from doubt as to the identification; not so clear that actual rape had not been committed. The counsel for the prisoner asked for a reserved case on the following grounds:—

Improper admission of evidence.

1. In recalling Mrs. Ada Clarke and asking her as to a statement supposed to have been made by her to officer Greer, in the absence of the prisoner, to the effect that he had "been working all day Saturday."

2. In allowing officer Greer to be called in rebuttal of Mrs. Clarke, and to be asked whether she had not said to him that the prisoner had been working all day Saturday, because (*a*) the statement, if made by her, was made in the absence of the prisoner, and, therefore, not admissible against him; (*b*) the circumstances of the supposed statement were not sufficiently designated to her. She was asked as to a statement; Greer's evidence was as to a reply. It was in evidence that she had seen Greer twice on the day in question, and the occasion was not particularized in her cross-examination; and (*c*) Mrs. Clarke's statement was as to a matter not material to the issue, and, therefore, could not be rebutted.

3. In admitting statements of May Short and Ethel Train made to police officers and to Louis Train as to the description of the assailant of Ethel Train, and statements of Louis Train, such statements not being (*a*) part of the *res gestæ;* nor (*b*) made in the presence of the prisoner; and (*c*) statements made by May Short, not being admissible under any circumstances, no assault having been committed upon her; (*d*) statements made by Ethel Train, not being admissible, as consent not involved in the crime; (*e*) statements all too late, as when admissible at all, only those first made are so; (*f*) evidence of Louis Train, not being admissible under any circumstances.

4. In admitting evidence of the police officers; (*a*) as to statements to them by May Short and Ethel Train as to description of assailant of Ethel Train; (*b*) that they, the officers, were looking for a person answering to a particular description given by May

Short or Ethel Train: (c) that in consequence of what they were told by May Short and Ethel Train they went to certain places, and did certain things.

Misdirection—(1). In telling the jury that there was a presumption against the truth of a prisoner's testimony. (2). In telling the jury that the only inference they could draw from the testimony was that an attempt at rape had been committed, if they believed the testimony at all.

Non-direction—(1). In not telling the jury that they might find the prisoner guilty of indecent assault.

The grounds now to be examined can be divided into four, viz.:—

1st. The wife of the prisoner, having denied in her evidence that she made a statement to officer Greer inconsistent with a part of her testimony, was it error to permit officer Greer to rebut that denial?

2nd. Was it proper to admit in evidence the statement of the victim of the assault and of her companion, who was with her during the beginning of the assault, that they had described to the police officers the offender, and the clothes he wore on the occasion; and also was it error to receive admissions from the officers that they had obtained from the girls such descriptions? It must be remembered that in no case were the girls or the officers permitted to state what the descriptions were that they gave and received respectively.

3rd. Was it error to permit the father of the victim of the assault to state that his daughter gave, in his presence, a description of the prisoner; and was it proper to permit him to state what that description was?

The fifth and sixth grounds as stated are in reality not reserved, as the trial Judge denies, not only the correctness of the interpretation of the prisoner's counsel of that part of his charge as reported, to which objection is taken, but also denies that his charge on the points raised is properly reported.

4th. The seventh ground calls for a decision as to whether it

is error if the Judge in his charge on the trial on an indictment containing one count only, viz.:—an attempt to commit rape—omits to point out to the jury that the law, on such an indictment, permits the finding of a lesser offence than the one charged.

As to the first ground, the crime was committed between two-thirty and three-thirty on the afternoon of Saturday the 4th of August last. Mrs. Clarke gave a detailed account of her husband's whereabouts from about twelve-thirty (12.30) to about two p.m. From about two to four she did not see him, but stated he had obtained ten cents from her to go and get a shave. From four on to night, she described where he was and what he was doing. Her testimony on that point was clear that the prisoner was not working on the afternoon of the 4th. That being her declaration, she was asked by the Crown counsel: "Did you not, on Sunday the 5th of August last, at your house, tell policeman Greer that 'your husband was working all day Saturday?' She replied: No, I did not." Here was a positive statement, if made to officer Greer, not only inconsistent with her evidence, but contradictory of it in a very important particular. It seems to me quite established by authority, that evidence may be given in rebuttal under such circumstances. The principle has long been acted upon that where a witness has made to a third party a statement relative to the subject-matter of the case, and, in his testimony he contradicts that statement, proof may be given that he did in fact make it. Before doing so, however, the witness's attention must be drawn to the person to whom he so stated the circumstance, the time, place of his so stating it, and such particularities as will convince the Court that the witness so interrogated is not taken by surprise. The statute law (Crim. Code, sec. 701) goes further, and permits such a course, even when the witness does not deny, but will not distinctly admit that he made such a statement. In this case, I believe the fact of the prisoner working or not working all day Saturday was clearly relating to the subject-matter of the case. But, even if not strictly relevant, it was just such a false assertion of a fact as was full of meaning in relation of the wife's intentions as to what she desired to be

believed in connection with her husband's doings that afternoon, and, just such a circumstance, if she made the statement, as would prove her willingness to resort to falsehood to shield her husband. And, if such a statement was made by the wife with the view of creating falsely a favourable impression of the prisoner's case, it was quite proper to have it submitted to the jury who had to pass upon her whole evidence. In this point, however, is involved more than the question of the admission of officer Greer's evidence. Were the conditions required for the admission of such evidence sufficiently established? The decision of that question is in the discretion of the presiding Judge; and I believe the person, time and place were, in the question itself, brought to the witness's attention sufficiently to have her understand just what conversation was intended; and particularly had I reason to believe that, when I considered the other evidence in the case. The prisoner was arrested in her presence on that Sunday by officers Greer and Caples, and such a circumstance as that would naturally bring the witness's mind when asked relating to that Sunday, and to the officer who assisted in the arrest, and the conversation there had, and all that took place, and she would recall whether she spoke falsely then to officer Greer in relation to her husband's doings the day before. She could not well be mistaken as to that. Therefore my discretion was, in my opinion, rightly exercised in allowing the evidence of Greer with the knowledge I had obtained in that trial. But, had I lacked information from the circumstances detailed in this trial, I had ample information from the evidence given by Mrs. Clarke herself on the former trial, heard not long before, wherein she was closely interrogated as to all the details of her conversation with Greer on that Sunday. I was not, however, driven to use that information.

Second point. It seems to me that this point is disposed of against the contention of the prisoner, by stating merely that neither the girls nor the officers were permitted to state what descriptions were given. All they were permitted to do was to state generally that descriptions were given and received. Such

statements for the purpose of the discovery of an offender are necessarily, and almost always made a part of the *res gestæ*, and the fact of its being done is properly in proof.

Third point. I find more difficulty in disposing satisfactorily of the third point. Louis Train, father of the victim, was present some four hours after the assault, when his daughter gave the police officers the description of the man who assaulted her. Already the victim had spoken on two or three occasions of the assault and of her assailant. First, to a Mr. S.——, the first person she met after the assault; secondly, to some police officers at a police station within an hour or an hour and a half after her first meeting Mr. S.——. I do not take it that this conversation that Louis Train heard was addressed to him by his daughter. Had the statement been directly to her father, her natural and legal protector, and so recently after the fact as to preclude the probability of her being practiced upon, I would think the evidence would be clearly admissible as a part of the transaction. Here, I would think, the meeting her father was too remote from the assault to make the statement admissible on that ground; but, are there not other circumstances in the case that would make the evidence of Louis Train good?

The Attorney-General contends that the prisoner's counsel having, in the cross-examination of the victim, obtained from her the admission that from the description she gave in the presence of her father he concluded that the assailant was another man, it became necessary, in the interest of clearness and of justice, and to prevent incorrect inferences, to give the jury the best opportunity to judge as to whether she was consistent in her several descriptions or not including that given by her in Court that what she did say should be given to the jury. I acquiesced reluctantly in that view and permitted the evidence. On further reflection I believe the contention of the Crown is right. Had the evidence been excluded a very strong but groundless argument would have been made to the jury that the father of the victim having pointed to another man as suiting the description given in his presence it was reasonable to conclude that such description

that she then gave was not the same as given in Court. More particularly would such a presentation have had much force when it transpired that the man pointed to who was brought into the Court, and sworn, did not, in any particular, when confronted with the prisoner, suit the description given by the girl in Court. Moreover, I believe that the obtaining by the prisoner's counsel from the victim the answer that her father had sent a message to some of the police that there was some other man who had assaulted her, and, it being reasonably inferred that the message was sent on account of the description she gave in his presence, the Crown might give in evidence the description given, so the jury could judge how far the father was justified in arriving at the conclusion he did, and to shew that the description she gave in the presence of her father was not inconsistent with that given to the jury. I believe, therefore, that the defence having given evidence of the circumstances that resulted from the description given by the victim of the assault, taken with the evidence of the whole case, made the issue one of identity only. And to establish that identity it became important that no false impression that could be removed by Louis Train's evidence on that point should be allowed to be made by the absence of it.

The fourth point is not tenable. The indictment contained one count only. The evidence, if believed, established abundantly an attempt to commit rape, if not rape itself. No contradiction was given of that evidence, only such that might be inferred from the doctor's evidence. Outside of the doctor's evidence, the commission of the crime of rape was proven. The doctor's evidence could be considered only in determining whether rape had been committed or not, and, as that was not involved in the issue, I did not refer to it. In fact the only issue involved was one of identity. No question of a minor offence was raised by the evidence. Under such conditions it became superfluous to explain that the indictment permitted the finding of a lesser offence. As well require, when the evidence did not raise the question, a Judge to explain that non-consent may be implied if the victim

is made drunk by the assailant, or if she was asleep, or idiotic, or was betrayed in the belief that the assailant was her husband.

For these reasons I believe the verdict should not be disturbed.

McLEOD, J. (dissenting):—The defendant in this case was tried before Mr. Justice Landry at the September circuit for the city and county of Saint John on an indictment charging him with assault with an attempt to commit rape on one Ethel Train. The defendant was found guilty, and the learned Judge at the request of the prisoner's counsel reserved a case for consideration of the Court.

The case, as reserved, presents the following questions for consideration: —

1. The defendant's wife (who was a witness on his behalf) after she had concluded her testimony was permitted to be re-examined at her home, in the presence of both counsel, and the Attorney-General was allowed to ask the following question:—

> "Q. Did you on Sunday the 5th of August last, at your house, tell policeman Greer that your husband was working all day Saturday? A. No, I did not."

And officer Greer was allowed to be recalled to rebut this answer given by Mrs. Clarke.

2. Admitting statements of May Short and Ethel Train to the police officers. The statements, however, (if they may be called statements) were only as to the fact that they had described the man who made the assault to the policeman, but they were not permitted to give in evidence what they had in fact said to the policemen.

I think this can not be complained of, and need not be further referred to. In the cross-examination, however, of Ethel Train, the defendant's counsel asked the following questions:—

> "Q. As a matter of fact, did you not know of your father sending a message to some of the police that there was some other man who had assaulted you? A. Yes, sir."

"Q. Do you know what man it was your father said? A. I do not."

"Q. From the description you gave, your father picked out another man? A. Yes."

Louis Train, the father of Ethel Train, was allowed to state the description given by Ethel Train in his presence of the man who made the assault. I will discuss this later.

Admitting the evidence of police officers Corbett, Jenkins, Caples, and Greer, that a description of the man had been given them; but they did not give the description given them, they only said that with the description given them they looked for the man who had committed the assault. I think there is no good objection to that evidence.

The fifth and sixth sections in the reserved case refer to the charge to the jury. It was claimed that the learned Judge, in charging the jury, told them that there was a presumption against the truth of the prisoner's testimony, and that he charged them without qualification that the only inference to draw from the evidence was that an attempt at rape had been made. The charge itself was not very well reported, and the learned Judge says that he did not make any such statement in his charge, and, I think, we must accept that. In addition to this, however, I have carefully read over his charge as reported, and, I think on consideration of the whole of it, that the objections made to it can not be sustained. He left the evidence of the prisoner to the jury, as well as the evidence given by other witnesses, and told them that from all the evidence given, that given by the prisoner as well as that given by other witnesses, to draw their conclusions and find their verdict.

The seventh objection is, that the learned Judge omitted to direct the jury that the law permitted them, if the facts justified it, to find an offence less than the one charged.

The main questions in the case are as to the improper admission of evidence, but I will refer to the seventh question later.

There is no doubt but that a foul assault was committed on

the girl Ethel Train, and the real question to be tried was as to the identity of the man who committed the assault; that is, whether or not the defendant was the man who committed it. The defendant himself was a witness on his own behalf, and denied the charge.

As to the first question reserved, that is, as to the re-examination of Mrs. Clarke after her full examination had been concluded, and the evidence given by policeman Greer in reply thereto, the objection first taken is that it was an attempt to contradict her on an immaterial matter, and, second, that her attention was not sufficiently called to the time at which it was said she made the statement.

The question objected to is as follows:—

> "Q. Did you not on Sunday, the 5th day of August last, at your house, tell policeman Greer that your husband was working all day Saturday? A. No, I did not."

And the evidence of police officer Greer, in contradiction thereto, is also objected to.

Mrs. Clarke had been examined and left the stand, and the Attorney-General then applied to have her recalled for the purpose of asking this question. She was in a hysterical condition and was not fit to be brought into Court again, so it was agreed by all parties that she should be examined in the sheriff's office. There is no objection taken to the fact that the prisoner was not present; it was agreed to by himself and his counsel, and no objection is taken to that. The objection arises on the question itself.

The offence, I may say, was committed on Saturday the 4th of August, at somewhere about three o'clock in the afternoon.

The witness, Mrs. Clarke, had said on her examination that the prisoner was at work during the forenoon of Saturday the 4th of August, that he came home at about half past twelve, and she stated where he was during the afternoon, but that he was not at work. The Crown was then allowed to recall her and ask this question for the purpose of laying a foundation to contradict her,

and thus discredit her former statement as to where the prisoner was during that afternoon. It was claimed that the question was immaterial to the issue, and, therefore, could not be contradicted. I do not think that objection can prevail as the answer given by the witness would very materially effect the evidence already given by her as to the whereabouts of her husband during that afternoon.

Prior to the passing of the Criminal Code, questions such as this for the purpose of contradiction were, I think, always allowed, and they are expressly provided for by section 701 of the Criminal Code. The only question, I think, is whether the particular occasion on which the alleged statement was made was sufficiently designated to the witness.

The latter part of section 701 is as follows: "But before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make such statement." This portion of the section does nothing more than declare what has always been the rule, at all events since *The Queen's case,* 2 Brod. & B. 284, though that case does not state as to the particularity required, but, so far as I know, it has always since been held that the attention of the witness must be called to the particular time and circumstances at which the statement was made.

In *Angus* v. *Smith,* M. & M. 473 (a *nisi prius* case it is true, but Tindal, C.J., was the presiding Judge), a witness for the plaintiff had denied, in his cross-examination, that he had ever said he was in partnership with the defendant. The defendant's counsel proposed to ask a witness for the defendant whether or not, on a particular occasion, the plaintiff's witness had told him he was in partnership with the defendant. An objection being taken Tindal, C.J., refused to allow the question, and, after stating the general rule, says:—

> "It is not enough to ask him the general question whether he has ever said so and so, because it may frequently happen that upon the general question he may not remember having

so said; whereas when his attention is challenged to particular circumstances and occasions he may recollect and explain what he has formerly said."

In this case the witness was simply asked as to whether she did at her home on Sunday make this statement to policeman Greer. Greer had in fact been at the house twice that day, first at twelve o'clock, when he says in his first examination the witness told him the prisoner was not in, and afterwards at about two o'clock when the prisoner was arrested.

It seems to me when Mrs. Clarke was being examined for the purpose of contradiction, as to a conversation alleged to have been had with Greer, or rather as to a particular statement which it was then alleged she had made to Greer, her attention should have been called to the particular conversation alluded to and the time it was claimed to have taken place; that is, whether it was when he was there at twelve o'clock or at two o'clock. If her attention had been challenged to the particular occasion and the circumstances she might have been able to explain what she had said at that time; but, where the question is asked simply as to what she said on Sunday, with nothing said to call her attention to any particular conversation she had with Greer on the day during which the alleged statement was made, I think it does not meet the requirements of the statute or the well-known rule as to this class of evidence; and this is more especially true in view of the condition of the witness when the question was asked her. I think, therefore, Greer's evidence in contradiction was inadmissible. He contradicts her and says she made the statement to him at twelve o'clock on Sunday. Mrs. Clarke, I think, should have been asked plainly whether or not she did, at twelve o'clock on Sunday, make the alleged statement, and then she could have explained just what was said at that time, or her counsel could have asked her as to the particulars of the conversation. Greer's evidence, in contradiction, certainly does not seem to me to be very satisfactory, and this was admitted by the Attorney-General on the argument, but that does not help the matter; the jury may have believed him. It was important evidence, and if the

jury believed it, it would have an important influence on their minds in finding their verdict.

The most important question, however, is as to whether the evidence given by Louis Train, the father of Ethel Train, was admissible or not. In order to understand this, it must be borne in mind that the offence was committed on the afternoon of Saturday the 4th of August, at somewhere about three o'clock. A girl named May Short was with Ethel Train, and she ran out to the road, and, as Mr. Skinner was passing in a team, she called to him. He immediately took her in and drove up to the place and saw Ethel Train, who came up to him and told him that she had been assaulted. The two girls were then taken to the police station at the north end, and they made the statement there to the policemen of what had been done, and gave some description of the man. Ethel Train then went home. In the evening policemen Caples, Jenkins and Greer went to the house of Louis Train, the father of Ethel Train, on Brussels Street, Saint John. May Short was there, and Ethel Train gave them a description of the man who assaulted her. I gather from the evidence that this description was given in answer to questions. Her father, Louis Train, was present when the description was given. (See Louis Train's evidence, page 80, and Sergeant Caples' evidence, page 111, and Jenkins' evidence, page 104.) The policemen were not allowed to give in evidence the statement of the description of the man given to them.

Ethel Train, when called as a witness for the Crown, swore that the prisoner was the man who committed the assault. She also gave a description of the man and the clothes he wore, but, in her direct examination did not say anything as to the kind of collar he wore, and in her cross-examination she stated as follows:—

"Q. What kind of a collar did the man have on? A. I did not notice the collar."

"Q. You could not state whether it was a stand-up like this or turned down? A. I can not say.

"Q. Did you notice the necktie? A. No."

"Q. Did you notice the kind of necktie? A. No, I did not notice that."

"Q. Had he a vest on? A. Yes, sir, a blue vest like his coat."

"Q. Did you notice anything about the shirt? A. No, sir."

"Q. You did not notice the necktie or collar or shirt? A. No."

Later on in her cross-examination she was asked the questions referred to in the reserved case, and to which I have referred; that is, as to whether her father had not sent a message to some of the police that another man was the guilty one, to which she replied "yes."

Louis Train, her father, was then called and asked the following question:—

"Q. What was the description which your daughter gave of the man? A. She said he was a middling large man—a kind of a dark, sandy moustache, and his cheek-bones were kind of high, and kind of red-faced. She said the gentleman had a kind of dark blue suit on; he had canvas shoes with leather straps, toe taps and leather across the instep, and, I think, she said he had a hard hat on, and she spoke about a tear in the back of the gentleman's coat, either under the arm or below the shoulder, and, I think, she said he wore a kind of Dewey collar; I do not know whether it was a stand-up or turn down, but a kind of double collar. I think they call them Dewey collars.

"Q. From the description you thought it might apply to some person whom you named? A. I did at that time."

This description, as I have said, was given at her father's house on Saturday evening, and, as I gather from all the evidence, was really given to the policeman. Her father says, on page 80, in answer to the Attorney-General, as follows:—

"Q. When did you see your daughter? A. Over at the north end police station."

"Q. Then that evening the policeman came to your house? A. Yes."

"Q. When did your daughter first give a description in your presence of the man who had assaulted her? A. It was in the evening when the officers were in the house. That was Saturday evening—the same evening as the day she had been assaulted."

"Q. What time of evening was it? A. I do not remember, but, I think, it was somewhere around eight or half past?"

It is true that, in cases such as this, the statements made by the complainant immediately, or as soon as possible after the commission of the offence are admitted in evidence, not as a part of the *res gestæ*, nor as evidence of the facts complained of, these must be proved in the Court by the prosecutrix or other credible witness. It can only be used as corroborative of the evidence given by the witness as to the assault, and it must be made as speedily after the acts complained of as could reasonably be expected: See *Regina* v. *Lillyman*, 18 Cox C. C. 346. But there is no rule that, after the prosecutrix has made a statement which would be admissible in evidence, that statements which she afterwards makes to the police officers describing the person complained of can be given in evidence. The case I have already referred to holds that the whole of the first complaint can be given in evidence, but it expressly holds that the complaint should be made as speedily after the acts complained of as could reasonably be expected, but there is no authority that I know of that permits subsequent statements made being given in evidence. I think on that ground the evidence is inadmissible. Perhaps, however, I have discussed this ground at greater length than is necessary, as the evidence was neither offered nor received on that ground. It was, however, offered and claimed to be admissible, because the prisoner's counsel in cross-examination had asked the question I have spoken of; that is, whether or not her father from the description she gave had not suspected another man. I can not think that makes it admissible.

Louis Train was not called to contradict the statement of Ethel Train, indeed her statement could not be contradicted by the Crown, as she was a witness for the Crown, and not a hostile witness. The question and answer were probably objectionable, but no objection was made. The statement of Train, as to his suspicions and what he said to his daughter was entirely collateral, and could have no bearing whatever on the case. The sole question was whether or not the prisoner was the party who had committed the assault, and the fact that her father had, previous to the arrest of the prisoner, suspected someone else would not make evidence admissible that was not properly admissible. The ground on which it was offered and admitted was that it was necessary to explain why he suspected another man (Cunningham), and it was said that if it was not explained an argument (a very fallacious one indeed) might be made to the jury, that the Crown could not explain why he suspected Cunningham. Such an argument, of course, could have no bearing on the case, and the jury would, of course, have been told that her father's suspicions could not affect the case. The simple question was as to the identity of the man who had committed the assault. Ethel Train had sworn positively that the prisoner was the man, and had given a description of the clothes he wore, but in her evidence she distinctly said she did not notice the collar or shirt, and did not know what kind of a collar he wore. She also said he wore canvas shoes with straps across them, but did not mention that they had toe caps. She was supported as to the identity of the prisoner by May Short, and other witnesses were called to support, as far as they could, the case of the Crown.

The defendant, on his part, absolutely denied the assault, denied that he was in the vicinity where the assault was committed, and stated where he claimed to have been that afternoon. He also called other witnesses to shew where he was that afternoon, with a view of shewing that he could not have been in the vicinity of the place where the assault was committed.

The importance of the evidence given by Train, both to the prisoner and the Crown, is that he says, in the statement made in

his presence, Ethel Train gave a more definite description of the clothes worn by the man who assaulted her than she did when examined as a witness for the Crown. He, in fact, practically contradicts her. Ethel Train said that she did not remember that he had any collar, that she did not notice it at all. Train says that in the statement she made in his presence she said he wore a Dewey collar, and canvas shoes with toe caps, but in her evidence she had not spoken of the shoes having toe caps. One of the policemen found on a bed in the prisoner's house, on the Sunday he was arrested, a soiled collar which they called a Dewey collar, which answered the description given by Train. They also took from him a pair of shoes which completely answered the description given by Train. These articles were produced in Court, and Train was examined with reference to them, as to whether they corresponded with the description Ethel Train had given in his presence on Saturday, and he stated they did.

The following evidence was given:—

"Q. Would you call these canvas shoes? A. Yes, that is what I would call canvas shoes with leather straps across the instep and leather toe caps."

"Q. Did Ethel Train speak Saturday night of the leather toe caps? A. Yes."

In giving her evidence in Court she had not spoken of the shoes having leather toe caps.

The collar found in the prisoner's house was also produced in Court to the witness, and he said it was the kind he meant for a Dewey collar.

This evidence, so given by Louis Train, was used by the Crown to the jury to assist in proving the identity of the prisoner as the person who committed the assault, and, I think, it may also be said that it does not at all account for him suspecting Cunningham. The description given does not at all correspond with Cunningham, or with the description Train himself gives of Cunningham. The real reason that he had that night for saying that it might be Cunningham is given on page 82 of the case. He

was worried and excited, and would jump at any wild theory, and, therefore, mentioned Cunningham who was working near there.

As I have said I think this evidence is clearly inadmissible. It was not admissible under the rule for admission of a complaint made by a prosecutrix within a reasonable time after the assault, and it was not offered or received on that ground. And it was not admissible by reason of the question asked Ethel Train on cross-examination. I have gone over it, however, thus fully in order to shew that it was used by the Crown and pressed in by the Crown, for it was, I think from the record, pressed in against the opinion of the learned Judge, for the purpose of assisting to identify the person who had committed the crime, and that it did or might have been an influence, and perhaps a strong influence (where there was, as in this case, a strong conflict of evidence) on the jury when they were determining the identity of the man who committed the assault, that is, whether the prisoner was the man or not.

As to the seventh question reserved, no question was raised that a lesser offence than an attempt to commit rape had been committed, and it seems to me that was the offence for which the prisoner was tried. The only question really tried was whether or not the prisoner was the man who committed it. I think this objection can not prevail.

It is, however, contended on the part of the Crown that, though this evidence was inadmissible, under section 746 of the Criminal Code, sub-section (*f*), the Court should refuse the prisoner a new trial. The sub-section is as follows:—

> "Provided that no conviction shall be set aside, nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial, or some misdirection given, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage was thereby occasioned on the trial."

And it is claimed that outside of this evidence objected to and admitted there is sufficient evidence to support the verdict of guilty.

I can not think myself that this section can be made to apply to a case such as this. If the evidence objected to is evidence that may be used and acted on by the jury, as proving the guilt of the prisoner, then I think the section does not apply. The prisoner is entitled to trial by jury on proper evidence submitted in his case. It may very well be that if evidence is improperly admitted that would have no bearing on the case, and would not in any way tend to shew the guilt or innocence of the prisoner, and there was sufficient evidence properly admitted to justify the jury in bringing in a verdict of "guilty," the Court would not allow the appeal, because no substantial wrong or miscarriage was thereby occasioned.

The rule that is laid down by the Lord Chancellor in *Makin* v. *The Attorney-General for New South Wales* (1894), A.C. 57, in my opinion is the correct rule, with reference to cases arising under section 746, of the Criminal Code. It is there stated as follows: (Page 70.)

> "Their Lordships do not think it can properly be said that there has been no substantial wrong or miscarriage of justice, where on a point material to the guilt or innocence of the accused the jury have, notwithstanding objection, been invited by the Judge to consider in arriving at their verdict matters which ought not to have been submitted to them. In their Lordships' opinion substantial wrong would be done to the accused if he were deprived of the verdict of a jury on the facts proved by legal evidence, and there were substituted for it the verdict of the Court founded merely upon a perusal of the evidence. It need scarcely be said that there is ample scope for the operation of the proviso without applying it in the manner contended for. Their Lordships desire to guard themselves against being supposed to determine that the proviso may not be relied on in cases where it is impossible to suppose that the evidence improperly ad-

mitted can have had any influence on the verdict of the jury, as for example, where some merely formal matter, not bearing directly on the guilt or innocence of the accused, has been proved by other than legal evidence."

That decision was given under a statute of New South Wales, the proviso of which is as follows:—

"Provided that no conviction or judgment thereon shall be reversed, arrested or avoided on any case so stated, unless for some substantial wrong or miscarriage of justice."

I do not think the words of the Canadian statute require any different construction to be given to them than is given to the statute of New South Wales. The Lord Chancellor in discussing it seems to be dealing with it as though the words, with reference to the improper admission of evidence, were involved in that proviso. He says at page 69:—

"The point of law involved is, whether where the Judge who tries a case reserves for the opinion of the Court, the question whether evidence was improperly admitted and the Court comes to the conclusion that it was not legally admissible the Court can, nevertheless, affirm the judgment if it is of opinion that there was sufficient evidence to support the conviction independently of the evidence improperly admitted, and that the accused was guilty of the offence with which he was charged."

They hold the prisoner is entitled to trial by jury on legal evidence admitted. Of course, at common law, the Court would be obliged to grant a new trial if the evidence was improperly admitted, and this section is passed to enable them not to grant the new trial if the evidence so improperly admitted is immaterial.

I see nothing in the statute that takes away the right of trial by jury on evidence properly admitted. If this Court can say that, notwithstanding some evidence was admitted illegally that might have a bearing on the verdict of the jury, yet it can read over the evidence and decide the case itself on the *facts*

outside of the evidence so improperly admitted, although the evidence may have a direct bearing on the case, it is constituting itself practically a jury for the trial of the cause, and this Court has no right to act as a jury. The prisoner had a right to the verdict of a jury on evidence properly submitted. The evidence I have referred to had a direct bearing on the identity of the person who committed the crime, and, I think, was improperly admitted, and it can not be told how far it affected the jury in finding their verdict.

It is true that the Supreme Court of British Columbia in *The Queen* v. *Woods,* 2 Can. Cr. Cas. 159, in discussing the section of the Canadian Act, made a distinction between the section of the Act of New South Wales and this section in the Canadian Act. I can not myself quite agree with the distinction so drawn. Both the acts say that a new trial must not be granted, unless substantial wrong or injustice was thereby occasioned on the trial. Now, surely, it is not possible for this Court to say that there was no substantial wrong or miscarriage of justice occasioned if improper and illegal evidence tending to shew the guilt of the prisoner is submitted to the jury by the Judge who tries the cause, or is given in evidence by the Crown in the prosecution of the case, because it is impossible for this Court to say what effect on the minds of the jury that evidence may have had, and, as I have already said, and as was said by the Lord Chancellor in *Makin* v. *The Attorney-General of New South Wales,* the prisoner is entitled to the verdict of the jury on legal evidence. If he has not had that, if the verdict of the jury is given on some evidence that was improperly admitted, then he has not had a fair trial, and this Court can not say that some substantial wrong was not occasioned, and it can not turn itself into a jury and try the case on a portion of the evidence that was submitted to the jury.

I think that the evidence so submitted, and to which I have referred at some length, more especially the evidence given by Louis Train, was in the first place illegal evidence, and was improperly admitted, and in the second place it might have had,

and I would think would have weight with the jury in coming to the verdict they did. In my opinion, therefore, a new trial must be granted.

HANINGTON, J., agreed with LANDRY, J.

GREGORY, J., agreed that the conviction should be affirmed.

Conviction affirmed.

[COURT OF KING'S BENCH, QUEBEC.]

CROWN SIDE.

DISTRICT OF MONTREAL.

BEFORE LAVERGNE, J.

THE KING v. LECLAIRE.

Obstructing officer of a railway—Railway Act, 1903, sec. 291—Revised Railway Act, R.S.C. 1906, ch. 37, sec. 425.

1. Any person who obstructs or impedes an officer of a railway company in the execution of his duty upon any of the premises of the company, is liable to fine or imprisonment under section 291 of the Railway Act, 1903 (Can.).
2. It is an obstruction of the railway officer for a cabman having no right upon the railway cab-stand to refuse to move away from same with his cab on the demand of the officer whose duty it was to enforce the company's regulations respecting the station property.

MONTREAL, April 3, 1906.

LAVERGNE, J.:—The respondent was prosecuted for having wilfully obstructed and impeded an officer or agent of the Grand Trunk Railway Co. in the execution of his duty upon the pre-

mises of that company at Bonaventure Station, in the city of Montreal, on the first of June, 1905.

The information was made on the 2nd day of June, 1905, the respondent was tried before the special sessions of the peace, and, on the 19th of July, 1905, the information or complaint was dismissed with costs. An appeal from this judgment is now submitted to the Court of King's Bench, Crown side.

The information is based upon section 291 of the Railway Act, and the appellant contends that article 490 of the Criminal Code equally applies to the case.

The respondent, who is a cabman, was, on the occasion in question, standing with his coach near Bonaventure station on a ground which he claims to be public property, and which the Grand Trunk Railway Co. claims to be its own private property.

The first question to be determined is then whether the ground mentioned is public or private property. The evident object of the parties is to make this a test case. The parties proceeded in one case in the court of first instance as well as before this Court, but four cases of the same nature were submitted on the same evidence.

The cabman was ordered off this ground but positively refused to leave. The prosecutor had him arrested and taken to the police station where he gave bail for his appearance and, immediately after, returned to the same ground, was ordered off again, refused to go away, was arrested a second time, brought to the police station where he gave bail, and went back to the stand and resumed his place in front of Bonaventure Station for the third time.

The ground in question is a square between St. James street and Chaboillez square and between Bonaventure station and buildings on the south east side called the St. James Hotel and the London House. The whole of this ground including the special place where there is a cab stand was firstly acquired by the Montreal & Lachine Railway Company, from the Hon. Louis Guy, in 1847, and after certain amalgamations of different

companies, became the property of the Grand Trunk Railway Company which has been the sole owner of the same since 1864. There is no question as to the title of the property, it resides in the Grand Trunk Railway Company alone, this had to be admitted by the respondent at the trial.

But the respondent claims that a certain lane along the St. James Hotel and the London House has been a thoroughfare for thirty years and over, connecting St. James street with Chaboillez square; that this has become a public street by dedication and that the city of Montreal, in virtue of sections 167, 168, 169 and 170 of 37 Vict. ch. 51, caused the said lane to be laid out, fixed and determined as a public street, and a plan of St. Antoine Ward made, completed and confirmed by the Superior Court in 1877. In virtue of section 171 of the same statute, the respondent claims that such plan, when confirmed by the Superior Court, is final, decisive and binding upon the city of Montreal, the proprietors therein interested and upon all other persons whomsoever.

However, the city of Montreal, after having this plan homologated did not proceed any further, never expropriated, nor dispossessed the Grand Trunk Railway Company of the ground. In virtue of section 173 of the same Act, the city has all necessary power to open to the public, whenever it shall deem advantageous to do so, in the interest of the city, any new street shewn on the plan, after having adopted, however, the formalities and procedure prescribed in the following sections of the same Act, relative to the mode of expropriation and the levying of special assessments.

These formalities and procedure have never been adopted.

The laying, determining and fixing of a public street on a plan is not the opening of a street; to open a public street, a resolution has first to be passed, decreeing such opening in virtue of section 175 of the Act. No such resolution has yet been passed. After the passing of such resolution, several proceedings are further required to open a public street and dispossess the owners of the ground upon which it lies. It is only in virtue of section

178 that such dispossession takes place, after the homologation of the report of the commissioners in expropriation, the deposit and consignment of the price or compensation and damages settled and determined in and by the report. It is only then that the title of the ground taken for a street vests in the city and that the proprietors are divested of their rights thereto. Then and only then, the city can take possession.

Notwithstanding that the plan was homologated as aforesaid, the city has never exercised the right which it had to expropriate, and in fact has always acknowledged the ownership of the Grand Trunk Railway Company. The city of Montreal can only claim the ownership of property: first, for which it holds a title; second, which it has expropriated; and third, upon which it has done work for over ten years, and after a report to that effect has been made and entered upon its registers. The corporation of the city of Montreal has caused a plan to be made of its territory, upon which the property it owns is indicated in colour and all private property is left white. It has also an index of the streets it owns. The index does not mention or include the lane or street in question. The plan shews that the ground in question is private property, it is not coloured. This lane has been known for many years as "Railroad Street" and it is the name which was adopted on the plan which I have first mentioned, which was homologated as aforesaid.

In 1880, St. James street was widened and a small strip of ground was taken from the end of the so called "Railroad Street." This plan was called assessment plan for the expropriation of part of lots 734 and 735 (the property of the Grand Trunk Railway Company); "Railroad street" is not mentioned on this plan. The Grand Trunk Railway property including the whole square was assessed as being lots 734 and 735 for this expropriation, and the company given compensation for the piece taken off from the so called "Railroad street," this piece of ground is taken from No. 734. Four plans were made for the widening of St. James street, one in 1880, the second in 1887, and

the third one in 1897, and the fourth in 1902. This last one is called "Revised assessment plan for the widening of St. James street." In all these procedures, the Grand Trunk Railway Company was assessed for part of Railroad street as being part of No. 734, the property of the company.

These facts shew, in an uncontrovertible manner, that the city of Montreal never claimed any ownership on any part of that property or of that so called "Railroad street."

The corporation has never done any work on that square. It was always maintained exclusively by the Grand Trunk Railway. The whole width of it was asphalted by the company and kept in proper condition. The question of dedication, however, might be said to remain unanswered.

It is claimed that the so called Railroad street was opened as a thoroughfare for over thirty years. This is untrue as the following facts will shew. To cause a street or lane to become a public street by dedication, an absolutely essential and indispensable element is necessary, that is the intention and will of the proprietor.

The Grand Trunk Railway very far from dedicating any part of said property as a public street showed itself very careful and jealous of preserving all its rights as an owner, upon said property, and always manifestly kept the full control of said property. The entrance on Chaboillez square to the company's property as well as the exit on St. James street were closed with gates from the beginning of the company's ownership until about 1879 or later. These gates were left open in day time, but were closed every night after the arrival and departure of the last trains. About the last mentioned date, the traffic of the company had grown so large, that the gates became very inconvenient and were removed, but the company kept posts with sign boards marked "Private, no thoroughfare" on Chaboillez square and on St. James street. It is proved that these signboards are still there, if not the same, they have been replaced by others of the same nature. It is also in evidence that the company always

prevented heavy vehicles from passing on that property such as the Shedding Company's wagons.

They never allowed any body else than their own employees to work there. This is proved by one Griffin, a foreman of the road department of the city for forty years.

The cabmen who are allowed on that property have to obtain a permit from the company, and since the building of the new Bonaventure Station, about twelve years ago, these cabmen have to pay to the company a dollar a month for their permit, besides paying for their license to the city of Montreal.

These facts are sufficient to establish that there never was any dedication. No servitude can be established without a title. Possession even immemorial is insufficient for that purpose. (Art. 549 C.C.) Acts which are only facultative or of sufferance cannot be the foundation either of possession or of prescription (art. 2196 C.C.). The prescription established by 18 Vict. ch. 100, art. 40, sec. 9, as to possession during ten years by a municipal corporation must be restricted to roads existing before the 1st of July, 1855. Vide *Town of Westmount & Warrington*, R.J.Q., 9 K.B. 101.

Besides this, the possession mentioned in said section, must be without contestation, and the section would not apply under the circumstances disclosed above.

Now, being of opinion that the Grand Trunk Railway Co. is the sole owner of every part of the ground and that there is no public street there, the only question remaining is whether the respondent is guilty of the charge preferred against him.

This question is somewhat secondary, as the object of the prosecution was evidently to have a judicial decision as to the rights of the cabman to remain on that ground against the will and authority of the Grand Trunk. However to arrive at a conviction the offence had to be proved.

The facts are very clear and do not require a long discussion. The cabman had no right to be there against the will of the com-

pany. The consent of the company for many years past was given by the issuing of monthly permits to the cabmen whom the company thought fit to have there. The company did not wish to have the respondent on its ground as a cabman any more, and refused to give him a permit on the first of May; on the 1st of June, he had not secured any yet, and he was told that he could not remain there any longer, it was on his positive refusal, which he does not deny, that he was arrested.

He answered the charge by saying that he did not obstruct the officer of the company, that, on the contrary, he submitted meekly to his order. That answer is absolutely untrue and futile. When arrested, he submitted to the peace officer and went to the police office. But he is not accused of rebellion to a peace officer. He did not obstruct constable Samson who arrested him, but he obstructed the Grand Trunk Company's officer by refusing to go away with his carriage, he persisted in coming back as soon as he was released from the hand of the peace officers; it is only when under duress that he remained away.

He positively refused, when called upon by the company's officer, to move away, and by this obstructed said company's officer, who had charge of the ground and whose duty was to have the company's regulations enforced. It is only when coerced by a peace officer that he was removed. The offence comes properly under section 291 of the Railway Act.

Having come to this conclusion, the appeal must be maintained, the judgment of the court of special sessions reversed and the respondent condemned to pay a fine of one dollar and the costs both of the Court of the first instance and of this Court, and in default of payment, to imprisonment for a term of one month.

The same judgment to apply to the four cases submitted.

Appeal allowed.

A. E. Beckett, K.C., for the Crown.

J. A. A. Germain, for the respondent.

[SUPREME COURT OF NEW BRUNSWICK.]

BEFORE TUCK, C.J., AND LANDRY AND McLEOD, JJ.

Ex parte CORMIER.

Summary conviction—Holiday—Dies non—Easter Monday—Non-appearance of accused—Conviction in his absence—Certiorari—Conviction affirmed—Cr. Code 1892, *sec.* 729—*Revised Cr. Code* 1906, *sec.* 961.

1. Easter Monday is not a statutory holiday and a magistrate may proceed to try a summary conviction matter upon that day.
2. *Semble*, Sundays are the only *dies non juridici* under Dominion laws.

ARGUED: June 5, 1907.
DECIDED: June 14, 1907.

Henry Cormier was charged with an offence against the Canada Temperance Act and a summons was issued calling upon him to appear and answer the charge on Monday the 1st day of April, 1907 (Easter Monday). He did not appear at the return of the summons and a conviction was recorded against him.

On the 22nd day of April Mr. Justice Landry granted an order *nisi* to quash the conviction on the ground that the 1st day of April, the day upon which the summons was returnable and upon which the conviction was made, was Easter Monday, a statutory and public holiday, and, consequently, a *dies non-juridicus*, and the conviction was therefore invalid.

FREDERICTON, June 5, 1907.

Chandler, K.C., now shewed cause. He contended (1) that if the objection was good at law and on principle it was cured by section 729 of the Criminal Code, 1892, which expressly provided that the taking of a verdict or other proceeding of the Court on a Sunday or other holiday did not invalidate it;

(2) that if the section did not apply the conviction was good, because Easter Monday was not a public or statutory holiday; (3) that if it was a public holiday it was not a *dies non-juridicus*. Sundays are the only *dies non-juridici* in this country. The other days which are observed as holidays by the public, or a portion of it, are not *dies non*: *Foster* v. *The Toronto Street Railway Company*, 31 O.R. 1; *Gilmore* v. *Gilbert*, 7 N.B.R. 50.

Sherren in support of the order. Section 729 of the Code of 1892, [Revised Code, sec. 961], only applies to matters before a jury and does not authorize other judicial proceedings on public holidays: Crankshaw's Criminal Code, 816. There are certain days as well as Sundays which are *dies non-juridici*, and judicial acts done on those days are invalid: *Reg* v. *Murray* 1 Can. Cr. Cas. 452; 28 O.R. 549; *Harrison* v. *Smith*, 9 B. & C. 243. Easter Monday is a statutory holiday: Rev. Stat. of Canada, ch. 1, secs. 7, 26.

FREDERICTON, June 14, 1907.

The judgment of the Court was now delivered by

TUCK, C. J.:—(oral). The only point argued in this case was that the conviction having been made on Easter Monday was invalid as being made on a public holiday, a *dies non-juridicus*. The Court are not of that opinion, although there were some cases cited which seem to give countenance to that view. On the other hand there are two cases in our own Court which we think are conclusive on the point. One is *Gilmore* v. *Gilbert*, 7 N.B.R. 50, which decides that Good Friday, though a public holiday, is not a *dies non*, and that a taxation of costs by the clerk on that day is not irregular; the other is *Upton* v. *Phelan*, 18 N.B.R. 192, in which case the judgment of Chief Justice Allen is in these words:

> "When this case was argued before me, it was assumed (or, I so understood it) that the Queen's birthday was

either established as a public holiday by statute; or, that the governor was authorized by statute to proclaim certain days public holidays, but this was evidently a mistake, as there is no such statute. The Dominion Statute, 31 Vict. ch. 1, only relates to the interpretation of the word 'holiday' when used in a statute, and the 35th Vict. ch. 8, sec. 8, only applies to matters concerning bills of exchange and promissory notes. The only effect, therefore, of the proclamation of the Lieutenant-Governor appointing the Queen's birthday as a holiday was to relieve the officers of the public departments from attendance at their offices on that day, and would not in any way affect the validity of the service of a notice upon an attorney in a suit pending. We, therefore, think the service in this case was sufficient, and that the order made setting aside the clerk's approval of the bond should be rescinded."

The opinion of the Court is that these cases are binding, and that while this case was tried and the conviction made on a holiday, yet it is not, as was contended, bad on that account. Every public holiday is not a *non-juridical* day and one upon which a conviction may not be made if the magistrate elects to hear it on such a day.

I might mention that Easter Monday is not a statutory holiday, and that the defendant did not appear at the trial and take objection to the case proceeding on the ground that it was a public holiday.

Order nisi discharged.

Note: *Criminal process—Court proceedings on Sundays and holidays—Rev. Cr. Code, secs.* 661, 961.

By the Interpretation Act, R.S.C. 1906, ch. 1, sec. 34 (11), it is enacted that in every Act, unless the context otherwise requires, the expression "holiday" includes Sundays, New Year's Day, the Epiphany, Good Friday, the Ascension, All Saints' Day, Conception Day, Easter Monday, Ash Wednesday,

Note—*Continued.*

Criminal process—Court proceedings on Sundays and holidays—Rev. Cr. Code, secs. 661, 961.

Christmas Day, the birthday or the day fixed by proclamation for the celebration of the birthday of the reigning sovereign, Victoria Day, Dominion Day, Labour Day, (first Monday in September), and any day appointed by proclamation for a general fast or thanksgiving.

By statute, R.S.C. 1906, ch. 106, Dominion Day, July 1 (or when July 1 falls on Sunday then July 2), shall be a legal holiday and shall be kept and observed as such. Similar legislation exists as to Victoria Day, May 24 (or when that date falls on a Sunday then May 25).

By sec. 661(3) of the Revised Cr. Code (formerly sec. 564 of the Code of 1892) every warrant of arrest authorized by the Code may be issued and executed on "a Sunday or statutory holiday."

Prior to this enactment it seemed that in provinces in which the statute of Charles II. was in force, a warrant of arrest could not be executed on Sunday, except in cases of treason and felony and such other offences as involved an actual or constructive breach of the peace. *Rawlins* v. *Ellis,* 16 L.J. Ex. 5, 16 M. & W. 172, 10 Jur. 1039. And in *Re Cooper* (1870), 5 P.R. (Ont.) 266, Galt, C.J., discharged a prisoner arrested under a coroner's warrant where the inquisition had been held on a Sunday and the warrant issued on that day.

It would seem that a warrant of commitment following a summary conviction is not within sub-sec. (3) of Code sec. 661; and an arrest on Sunday for default in payment of a fine under the Canada Temperance Act was held void. *Ex parte Frecker* (1897), 33 C.L.J. 248 (N.S.).

The Lord's Day Act of Canada, R.S.C. 1906, ch. 153, provides by sec. 16 that nothing therein contained shall be construed to repeal or in any way affect "any provisions of any Act or law relating in any way to the observance of the Lord's Day in force in any province of Canada when the Lord's Day Act came into force, 1st March, 1907.

It would therefore seem that the Sunday Observance Act of 1677, 29 Car. II. ch. 7, sec. 6, is still in force in Canada as regards process in criminal matters, except as varied by the

Note—*Continued.*

Criminal process—Court proceedings on Sundays and holidays—Rev. Cr. Code, secs. 661, 961.

Criminal Code or by statutes of the various provinces prior to Confederation. Section 6 of the statute of Charles II. enacted that—

> "No person upon the Lord's Day shall serve or execute or cause to be served or executed any writ, process, *warrant*, order, judgment or decree (except in cases of treason, felony or breach of the peace), and the service of every such writ, process, warrant, order, judgment or decree, on the Lord's Day shall be void to all intents and purposes whatsoever."

And so it was held under that statute that an arrest on a Sunday is illegal upon a warrant in execution for want of sufficient distress under a summary conviction. *R.* v. *Myers* (1786), 1 Term R. 265.

The evidence at the trial of a civil action not being concluded before the close of the day preceding Good Friday, the judge, counsel consenting and the jury desiring it, adjourned the Court to the following day, when he delivered his charge and received the verdict on which he entered judgment. Held, that it was competent for him to do so, and that the only day on which no judicial act can be done in Ontario is Sunday. Other statutory holidays are not *dies non-juridici* in this sense. *Foster* v. *Toronto Railway Company*, 31 Ont. R. 1.

By sec. 961 of the Revised Code, the taking of the verdict of the jury or other proceeding of the Court shall not be invalid by reason of its happening on "Sunday or on any other holiday."

The addition of the words "or any other holiday" at the end of the section was made by the Code Amendment Act of 1900, and was intended to remove doubt as to the validity of proceedings in jury cases, the trial of which continues until after midnight of a day preceding a statutory holiday.

In Manitoba it has been held that this section applies only to matters before a jury and not to a preliminary inquiry before a magistrate. *R.* v. *Cavelier* (1896), 1 Can. Cr. Cas. 134. In Ontario it has been held that a preliminary inquiry held by a magistrate and a commitment made thereon on a

Note—*Continued.*

Criminal process—Court proceedings on Sundays and holidays—Rev. Cr. Code, secs. 661, 961.

statutory holiday are invalid. *R.* v. *Murray* (1897), 1 Can. Cr. Cas. 452.

Section 961 is to be applied only to matters before a jury. The conduct of a preliminary inquiry before a magistrate is a judicial proceeding which cannot be legally taken on Sunday. *R.* v. *Cavelier* (1896), 1 Can. Cr. Cas. 134 (Man.); *Re Cooper*, 5 Ont. P.R. 256.

A preliminary inquiry held by a magistrate and a commitment for trial made on a statutory holiday are bad in law; but if after such commitment the accused elects to be tried at the County Judge's Criminal Court and pleads there to the charge and is convicted, the conviction is not invalidated because of the invalidity of the commitment for trial. *R.* v. *Murray* (1897), 1 Can. Cr. Cas. 452 (Ont.).

At common law Sunday was a *dies non-juridicus*, and all judicial proceedings on that day were therefore void. 2 Coke's Inst. 264-5, 1 Bishop on Crim. Proc., sec. 207.

The Court will take judicial notice that a certain day was Sunday: Wharton on Evidence, 3rd ed., sec. 335; *Tutten* v. *Darke*, 5 H. & N. 645; *Hanson* v. *Shackelton*, 4 Dowl. 48; *Pearson* v. *Shaw*, 7 Ir. L.R. 1.

[SUPERIOR COURT OF THE PROVINCE OF QUEBEC.]

(DISTRICT OF MONTREAL.)

BEFORE TASCHEREAU, J.

Re GÉVRY.

Summary conviction — Hard labour—Statute prescribing imprisonment—Incorrigible drunkard—62 Vict. (Que.) ch. 58, sec. 493.

1. A summary conviction imposing imprisonment with hard labour will be quashed if the provincial statute upon which it is based merely prescribes imprisonment.

DECIDED: October 15, 1906.

The petitioner Gévry had been condemned by the Recorder R. S. Weir to nine months' imprisonment with hard labour in the common jail, for having been found loafing drunk on a road in the City of Montreal, and as being an incorrigible habitual drunkard.

The petitioner took proceedings by way of certiorari and claimed that the provincial statute 62 Vict. (Que.) ch. 58, sec. 493, did not authorize hard labour. The statute declares that in cases of habitual and incorrigible drunkenness the Recorder can, at his discretion, condemn the delinquents to an imprisonment of six months at least and one year at most.

It was also contended on behalf of the petitioner that the Provincial Legislature, in passing such a law, had exceeded its jurisdiction and that the statute was *ultra vires*.

The Honourable Justice Loranger ordered that a writ of certiorari be issued.

The petitioner now applied to quash the conviction.

MONTREAL, October 15, 1906.

TASCHEREAU, J., rendered the following judgment:—

(*Translation.*)

"The Court, having heard the petitioner and the *mis-en-cause* by their respective attorneys on the merit of the writ of certiorari issued in this case, as well as on the motion of the petitioner to the effect of maintaining the said writ and of cancelling and annulling the conviction pronounced by the inferior court; having also examined the procedure and all the documents fyled; and deliberated;

"Considering that the conviction under consideration, to wit: that one pronounced by the defendant in his quality of Recorder of the city and district of Montreal, on the 28th March, 1906. condemning the petitioner to an imprisonment of nine months

in the common jail of the district of Montreal, with hard labour, for the charge of having been found loafing drunk in the said city, on the 27th of November, 1905, and being an idle and disorderly person in the sense of the law, with the aggravation of being an incorrigible habitual drunkard—is an illegal and void conviction inasmuch as the said defendant, with regard to said charge, could only condemn the delinquent to an imprisonment of six months at least and one year at most, and that the sentence to hard labour was not authorized by the law and thereby affects with nullity the sentence rendered;

"For this reason only, grants the petitioner's motion, maintains the certiorari and cancels and annuls the said conviction, with costs against the *mis-en-cause.*"

Conviction quashed.

L. Houle, for the petitioner.
O. Lavallée for the city of Montreal.
C. A. Wilson, for the Attorney-General.

Note: See *Re Beaulieu,* following this report.

[SUPERIOR COURT OF THE PROVINCE OF QUEBEC.]

(DISTRICT OF MONTREAL.)

BEFORE LAFONTAINE, J.

Re BEAULIEU.

Constitutional law—Provincial statute adding punishment for habitual drunkenness on prosecution under municipal law—Habeas corpus—62 Vict. (Que.) ch. 58, sec. 493.

1. Section 493 of the Quebec statute 62 Vict. ch. 58, punishing incorrigible habitual drunkards with a sentence of six months to one year relates to a matter pertaining to the criminal law and is ultra vires of the provincial Legislature.

2. The fact that such punishment is to be imposed only upon conviction for a municipal offence within the jurisdiction of a provincial legislature conjointly with the habitual drunkenness charged in aggravation thereof, does not validate the additional punishment imposed for the latter cause nor bring it within provincial jurisdiction.

DECIDED: January 25, 1907.

The petitioner, C. Beaulieu, while passing on Ontario street in Montreal, had been arrested by constable Lompré and charged before the Recorder with being an incorrigible habitual drunkard. He was condemned on the 23rd November, 1906, to six months' imprisonment.

The petitioner attacked the Recorder's sentence by way of habeas corpus and claimed that the Legislature had no power to pass such a law; that under the British North America Act, sec. 91, par. 27, the Federal Parliament alone has the right to legislate in criminal matters and that legislation of this character fell within the term "criminal law."

For the Recorder a defendant *ès qual.*, and for the City of Montreal, *mis-en-cause,* it was urged that the Recorder's Court, being a Court of Record, its judgments could not be questioned by way of habeas corpus, citing *Ex parte O'Kane,* Ramsay's Cases (Que.) p. 186.

MONTREAL, January 25, 1907.

LAFONTAINE, J., rendered the following judgment:—

(*Translation.*)

"The Court, after having heard the parties through their attorneys on the merits of the writ of habeas corpus issued in this case, examined the procedure, the documents fyled, and deliberated:—

"Whereas the offence committed by the petitioner is, that having got drunk he fell on the public road, on a street, in the City of Montreal, and that he has been found there, by a con-

stable on duty, lying drunk during the day between five and six o'clock in the afternoon, and did not there and then give satisfactory information about himself to the constable who requested him to do so;

"Whereas for this offence the petitioner was liable to a penalty consisting of a fine of $20 at most and, in default, an imprisonment of two months, such as is provided by 23 Vict. ch. 72, sec. 32, or by the Rev. Statutes of Lower Canada, ch. 102, sec. 11, reproduced in the Revised Statutes of Quebec, the provisions of which are declared applicable to the City of Montreal by the statute 62 Vict. (Que.) ch. 58, sec. 493;

"Whereas in the charge made against the petitioner it has been added to the charge that he was an incorrigible habitual drunkard, which, in the terms of the last paragraph of section 493, 62 Vict. (Que.), rendered the accused liable, for this alleged offence, to an imprisonment of six months at least and one year at most;

"Whereas in consequence of this addition in the charge to the offence committed by the petitioner and of the proof of the alleged fact, to wit: 'was an incorrigible habitual drunkard,' the petitioner has been condemned to an imprisonment during a period of six months;

"Whereas the Quebec Legislature under its jurisdiction on the matter "Municipal Institutions" (sec. 92 (8), of the British North America Act), which includes the power relative to the preservation of the peace and the maintenance of good order in cities, as well as the power to enforce its ordinances by the imposition of penalties, fines, imprisonment, cannot create a new offence not contemplated in the said statutes;

"Whereas drunkenness, even habitual and incorrigible, is *not* in its nature an offence and could be declared a "crime" by the Federal power only, in accordance with its jurisdiction in the matter of the criminal law (sec. 91 (27), B.N.A. Act), and that the above mentioned paragraph of clause 493 of the statute 62 Vict. (Que.) ch. 58, purports to create a new offence, unknown

before in the Statutes or the Criminal Code and to transform the first offence into an offence different in its constituent elements and in its punishment;

"The Court cancels the conviction and maintains the writ of habeas corpus with costs against the said City of Montreal, as the city contested the writ of habeas corpus."

Prisoner discharged.

L. Houle, for the petitioner.
O. Lavallée, for the City of Montreal and for the Recorder.

[TERRITORIAL COURT OF THE YUKON.]

BEFORE DUGAS, J.

THE KING v. KEARNEY and DENNING.

Resisting peace officer—Disorderly conduct in public place—Licensed saloon a "public place"—Rev. Cr. Code 1906, *sec.* 238.

1. A licensed saloon and billard hall is a "public place" under Rev. Cr. Code, secs. 197 and 238, and a person causing a disturbance therein by being drunk is liable as a vagrant.

Trial of defendants on a charge of resisting and obstructing a peace officer.

DAWSON, Y.T., April 26, 1907.

DUGAS, J.:—The accused Kearney, being drunk, went, accompanied by his co-accused Denning, on the night of 16th April instant, to a saloon known as the "M. & N." saloon in Dawson, where there is a billiard room and a place which is qualified as a theatre, besides being licensed under the Liquor Ordinance of the Yukon Territory. There was a large crowd

in the establishment. As soon as he entered the premises, Kearney became boisterous, took off his coat, took threatening positions, and wanted to fight the floor manager. In fact he did cause such a disturbance by "screaming, swearing, being drunk, and impeding and incommoding" the customers of the establishment who were present, that there is no doubt he was in contravention of sub-sec. (*g*) of sec. 207 of the Criminal Code, 1892 [Revised Code, 1906, sec. 238].

Sergeant A. A. McMillan of the Mounted Police happened to enter the place about the same time and witnessed the disturbance. He thereupon arrested Kearney. A short time before, he had met the same two persons in the street, Kearney being already drunk, whilst Denning, though having taken some liquor, could take care of himself. Kearney was then exposing his person by urinating, standing on the sidewalk with his face towards the street. Denning begged of the sergeant not to arrest Kearney, saying that he would take care of him, and bring him home. The sergeant very judiciously permitted him to do so, but only to find them shortly afterwards in this establishment, Kearney creating a disturbance and Denning apparenty being still in his company, but being quiet, as he was not at first noticed. The sergeant arrested Kearney. So soon as they reached the street, Kearney began to resist with all his might, and then Denning interfered with threats and wanted him to be liberated. Picking up a heavy stick, he threatened to strike McMillan therewith if he did not let his prisoner go. By this the sergeant was forced to let his prisoner loose, during which time Kearney also armed himself with two sticks, and both joined in similar threats. All this to such an extent that other constables had to be called to secure their arrest.

The facts leave no doubt as to their guilt under the indictment. I, notwithstanding, refrained from entering a verdict immediately after hearing the evidence, as I wanted to be sure that an establishment of that kind was a public place in the sense of the amendment of 1894 to sec. 207, which declares that

the expression "public place" in that section "includes any open place to which the public have or are permitted to have access, and any place of public resort."

My doubt lay upon the interpretation to be given to the words "public resort," but I find that in the language of the law all establishments of a similar kind are considered to be so; for instance, under the words "refreshment house" in Wharton's Law Lexicon, the same is defined as "a house kept open for public refreshment, resort, and entertainment between the hours of 10 p.m. and 5 a.m.," etc. Some authorities have been cited to me by the learned Crown prosecutor, by which it is further clearly shewn that there cannot be any doubt as to the interpretation which is given the words "public resort," and that an establishment such as the one where Kearney created his disturbance is a public place under the law and that Sergeant McMillan had the right to arrest him, as it was also his duty: Wharton's Law Dictionary, p. 780, under title "Public Houses"; Stephen's Criminal Digest, p. 115; Stroud, p. 632; Russell on Crimes, vol. 1, p. 748; *Langrish* v. *Archer*, 10 Q.B.D. 44; *Ex p. Freestone*, 25 L.J.M.C. 121; Bishop's Criminal Law, p. 1129; Seager's Magistrates' Manual, p. 356, and cases cited.

I may add that if this amendment of 1894 had not been enacted, such right would not have existed, notwithstanding sec. 69 of the Liquor License Ordinance of the Yukon Territory, which permits to eject, but does not permit to arrest, any one guilty of similar disturbances. I mention this as a direction for the officers of the peace who may sometimes find themselves in some doubt as to what may be their rights and duties.

I, therefore, find both accused guilty under the first count of the indictment. For this offence the law is very severe, as it declares that as much as 10 years' imprisonment could be imposed.

However, I will be as lenient as possible under the circumstances, with the hope that the punishment which I am going

to impose will be a sufficient lesson not only for the accused but for any one who may have the same disposition. Both of them are condemned to be imprisoned during the space of three months at hard labour.

Defendants convicted.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE RUSSELL, J.

THE KING v. REID.

Assault and pointing fire-arm—Intermixing of trials by magistrate—Same evidence in both cases except as to testimony of accused—First charge sustained and second dismissed—Want of prejudice to accused—Presumptions—Election of summary trial—Naming the jury Court without date of sittings—Revised Cr. Code (1906) *secs.* 777, 778.

1. On the summary trial of concurrent charges of assault and pointing a fire-arm, the magistrate after hearing the assault case reserved judgment to take up the second charge but no further evidence then being adduced except the examination of the defendant, the magistrate dismissed the second charge and entered a conviction upon the charge of assault. There is no presumption under such circumstances that the intermixing of the trials has prejudiced the accused, and the conviction should be sustained unless such prejudice is clearly shewn.

2. On obtaining the consent of the accused to a summary trial under Rev. Cr. Code, sec. 778, and stating to him his option of jury trial, it is not essential that the date of the sittings of the jury Court should be stated if the name of the latter Court and the city where the trial would take place are both specified and the accused told that he may be sent for trial at its "next ensuing sitting."

DECIDED: August 31, 1907.

The defendant was tried before Stipendiary MacDougall on two charges, viz., of assault and pointing a fire-arm at one W. H.

Day. The magistrate heard all the evidence in the assault case and then adjourned it to take up the charge of pointing a firearm. On the conclusion of the latter case he gave judgment in the assault case finding the defendant guilty and fined him $40 and costs and dismissing the second charge. The present motion is for the defendant's discharge upon habeas corpus.

W. J. O'Hearn, for the defendant cited: *R.* v. *McBurney* (1897), 3 Can. Cr. Cas. 339, and *R.* v. *Burke,* 8 Can. Cr. Cas. 14, as to the intermixing of trials. Secondly, the affidavits shew that the magistrate while informing accused of his right to be tried with a jury at the next sittings of the Supreme Court did not state when that Court would meet. Its meeting is fixed by law, and it meets at a particular time: *R.* v. *Walsh,* 8 Can. Cr. Cas. 101; *Ex parte McDonald,* 9 Can. Cr. Cas. 268. The commitment should shew on its face that he was informed of his right to be tried by jury; Paley on Convictions, p. 206; *R.* v. *Collins,* 5 Man. Rep. 136; *R.* v. *Hogarth,* 24 Ont. Rep. 60.

J. A. Knight, for the Attorney-General of Nova Scotia: The magistrate swears he was not influenced: *R.* v. *Sing,* 6 Can. Cr. Cas. 156; *R.* v. *Fry,* 19 Cox C.C. 135; *R.* v. *Bullock,* 8 Can. Cr. Cas. 8. As to second point, *R.* v. *Walsh,* 8 Can. Cr. Cas. 101, does not go as far as to decide that the time should be mentioned and it is authority only for mentioning the name of the Court.

As to third point the form of conviction does not make it necessary to shew that defendant was informed of his right to a jury trial. The commitment in this respect recites a good conviction.

O'Hearn, in reply: In *R.* v. *Fry,* 19 Cox C. C. 135, the magistrate was Lord Justice Fry and the Court was undoubtedly influenced in that case by that fact. See *R.* v. *Bigelow,* 8 Can. Cr. Cas. 132. As to the value of an affidavit by the magistrate if he were unconsciously biased, he is not in a position to admit it.

As to the second point, the Supreme Court may meet in special term, and in that case the magistrate would be bound to send the case to that term not the regular one; hence the necessity of stating the time of the sittings. The commitment must be construed without reference to the conviction.

HALIFAX, August 31, 1907.

RUSSELL, J.:—The defendant was tried before the learned stipendiary magistrate of Halifax County on two charges, one of assault and one of pointing a fire-arm at the complainant. Both charges were tried before any decision was given on either of them and the magistrate then proceeded to convict defendant for the assault and acquit him on the second charge. It is contended that this is illegal under the decision in *The Queen* v. *McBurney* (1897), 3 Can. Cr. Cas. 339, and *The Queen* v. *Burke*, 8 Can. Cr. Cas. 14, both of them decisions of the Supreme Court of Nova Scotia and binding upon me.

The cases referred to seem to establish that it is illegal to proceed in such a manner and that a conviction for the offence first tried, which is not made until after the magistrate has heard the evidence on another similar charge is necessarily bad and must be quashed, without inquiry into the question whether the magistrate was or was not in part influenced by the evidence on the second trial. The English cases do not seem to go quite so far.

In *Reg.* v. *Fry*, 19 Cox C.C. 135, the magistrates were allowed to shew that they had not in fact been influenced by the evidence in the second case and that they had been unanimously in favour of convicting at the close of the first case.

In the previous English case, *Hamilton* v. *Walker*, [1892] 2 Q.B. 25, 67 L.T.R. 200, which is cited in *The Queen* v. *McBurney*, it seems from the report of *Reg.* v. *Fry* in 19 Cox that Pollock, B., had said: "I do not go so far as to say that the justices might not reserve their judgment after hearing the evidence" (on the

first case). "Here there is nothing to shew that the justices in acting on each information proceeded on the evidence applicable solely to that information."

The inference is that if there were anything to shew that the justices proceeded on the evidence solely applicable to the information on which the defendant was convicted, the conviction would be good notwithstanding the objectionable manner of proceeding. In the present case there is no affidavit from the magistrate; but on application being made for leave to file one, defendant's counsel conceded that the case should be dealt with as if an affidavit had been made by the magistrate to the effect that he had not been influenced in deciding the first case by any evidence taken on the second charge. It was also stated by Mr. Knight, in opposition to the prisoner's application, that all the evidence applicable to both cases had been taken on the trial of the first charge and that nothing was added on the second trial that could influence the magistrate in deciding the case first tried. The evidence is before me in the form of a brief note from which it appears that the defence offered no evidence at all. The magistrate could not have done otherwise under the circumstances than find the defendant guilty. It seems to me it would be going a long way to say that there was any miscarriage of justice simply because on the trial of the second charge the defendant had been called as a witness and cross-examined. It is only from the statement of counsel that I learn that this occurred. It is not so stated in the affidavits and I have not the record in the second case before me. I am not to assume that the defendant's statement would prejudice his case with the magistrate, although it is quite conceivable that it could do so.

I think that, under the English decisions, I am justified in holding that, where the offence was clearly proved and no evidence was offered in exculpation, I am not bound to hold the conviction bad on account of the irregularity in trying both cases together simply because of the shadowy possibility that the judgment of the magistrate may have been influenced against

the prisoner by his examination in his own defence on the second charge and his cross-examination by the counsel for the prosecution.

The objection that the requisite question was not put to the defendant in order to acquire jurisdiction to deal summarily with the case must also fail. The magistrate asked him whether he "consented that the charge should be tried by him or should be sent for trial by jury at the next ensuing sitting of the Supreme Court of Criminal Jurisdiction at Halifax." This is all that the statute requires. There is nothing in the statute that I can find requiring the date of the sittings to be mentioned. No decision binding on me was cited to the effect that the date must be named and I am not aware of any such decision. If the date is fixed by law the prisoner in theory knows it as well as the magistrate. If it is not fixed by law I see no good reason why the magistrate should be required to know it.

He is simply, as I read the statute, to determine in his own mind at what Court it is "probable that the case can be soonest tried with a jury" and name that Court to the prisoner.

There is only one such Court in this province, and it is therefore impossible for him to go wrong here. The statute must, I think, have been intended for cases in which there might be more than one Court having jurisdiction.

The objection is also taken that the warrant of commitment does not state that the defendant was charged with the offence of which he was convicted. This is a question of syntax and I find no difficulty in connecting the statement that the defendant was charged with the subsequent branch of the sentence in which the nature and terms of the charge are set out.

The result is that the application for discharge is dismissed.

Prisoner remanded.

Note: *Intermixing of trials—Person charged concurrently on two or more informations before same magistrate.*

In *Hamilton* v. *Walker*, [1892] 2 Q.B. 25, H. was charged upon two informations before justices of the peace under different sections of a statute, the Indecent Advertisements Act, 1889 (Imp.). The justices having heard the case on the first information, were asked by the defendant's solicitor to dismiss it but they reserved judgment until they heard the other. The evidence being substantially the same in both cases, the Court quashed both convictions.

In *R.* v. *Fry* (1898), 19 Cox C.C. 135, 62 J.P. 457, there were several separate charges against the same defendant, but the justices satisfied the Court that, in adjudicating on each case, they applied to that case the evidence that was given with reference to it and no other. It was held that the postponement by the justices of the decision in the first case until they had disposed of the other cases did not under the circumstances render the conviction in the first case bad in law. The matter came up on a certiorari to quash the conviction.

Masters, a licensed victualler, had been charged before the Right Hon. Sir Edward Fry and two other county justices on three informations with three separate offences against the licensing laws—the first for permitting drunkenness on his premises on February 7, 1898; the second for selling intoxicating liquor after closing hours on February 8, and the third for keeping his premises open after closing hours on February 8. The first information was dealt with first, and the justices were in favour of a conviction, but adjourned their decision and the consideration of the penalty to be inflicted until they had heard the other two charges. The second information was heard and dismissed, and the evidence in support of the third information being the same as that in the second, the superintendent of police who prosecuted withdrew the third charge. The justices then reverted to the first case, and decided to convict the defendant, and imposed a fine of £5 and costs.

An affidavit of the justices was filed to the effect that in adjudicating on each case they applied to that case the evidence given in reference to it and none other, and that the evidence in the second case did not influence their decision on the amount of

Note—*Continued.*

Intermixing of trials—Person charged concurrently on two or more informations before same magistrate.

the fine they imposed in the first case. The Court (Wills, J., and Kennedy, J.), held, in a written judgment in which they distinguished *Hamilton* v. *Walker,* [1892] 2 Q.B. 25, that in regard to the information in question the justices proceeded solely upon the evidence applicable to it; that the conviction was good, and the rule must be discharged.

Section 777 of the Criminal Code of 1892, now section 838 of the Revised Code, contained a provision that upon a "speedy trial" before a county Judge for an indictable offence the Judge might adjourn any trial "from time to time until finally terminated."

But notwithstanding this section, it was held in *R.* v. *McBerny,* 3 Can. Cr. Cas. 339, that it is not competent for a Judge trying a charge without a jury under the speedy trials clauses of the Code to postpone his decision on the first charge until he had heard the evidence on several other charges against the same accused party, and to then decide the question of guilt in all To interject one trial into another trial of the same accused person for another offence is a proceeding which prejudices his defence and entitles him to a new trial upon both charges. If time be required in the first case for deliberation on the question of guilt after hearing the evidence, an adjournment may be made, but the trial of the subsequent charges must likewise be postponed. *R.* v. *McBerny,* 3 Can. Cr. Cas. 339, 26 N.S.R. 327.

The *McBerny case* was followed in *Rex* v. *Burke,* 36 N.S.R. 408, 8 Can. Cr. Cas. 14. The defendant, in that case, had been summoned to appear before the stipendiary magistrate of Sydney, C.B., to answer two informations for selling intoxicating liquor, in violation of the second part of the Canada Temperance Act. Evidence was heard in both cases, and both cases were then adjourned, until a subsequent day, when judgment was given, convicting defendant under one information, and quashing the other. It was held that the conviction must be quashed, the magistrate having heard evidence in both cases, and had them pending before him when he made the conviction, and the evidence in the one case, although dismissed, being calculated,

Note—*Continued.*

Intermixing of trials—Person charged concurrently on two or more informations before same magistrate.

under the circumstances disclosed, to influence the magistrate in the case in which defendant was convicted.

It was, however, suggested in *R.* v. *Sing*, 6 Can. Cr. Cas. 156, that evidence would not be admissible to shew what operated on a Judge's mind with reference to the conduct of the trial under the speedy trials clauses of the Code.

The same case is authority for the proposition that, where a magistrate trying two charges against the same defendant for similar offences reserved judgment in the first case until after the trial of the second, and then dismissed the first charge and convicted on the second, such conviction will not be set aside on certiorari, if it be shewn that the magistrate was governed in each case solely by the evidence therein given. *R.* v. *Sing*, 6 Can. Cr. Cas. 156.

In *The King* v. *Bullock and Stevens*, 8 Can. Cr. Cas. 8, 6 O. L. R. 663, the prisoners were charged before the County Judge on two separate charges of receiving, on two separate days, stolen goods, knowing them to be stolen, and of housebreaking and stealing on the second of the two days. At the close of the case for the Crown on the first charge on December 23, the Judge found a *primâ facie* case of receiving, and adjourned the case a week to let in evidence for the defence. Meanwhile he proceeded with the trial of the second charge, and remanded the prisoners for sentence. On December 30, he tried them on the third charge and acquitted them on it. On December 31, he sentenced them on the first two charges. The Judge certified that he came to his finding on the first charge before hearing the second, and was not conscious of having been biased on the latter, by the evidence given on the first. The Ontario Court of Appeal held, that, inasmuch as the circumstances of the three charges were altogether different as to time and place, and the only identity was in the person charged, and in respect to the principal witness, and also in view of what the learned Judge stated, and notwithstanding the expediency of not mixing up criminal charges, the convictions should be upheld.

[SUPERIOR COURT FOR THE PROVINCE OF QUEBEC.]

DISTRICT OF MONTREAL.

BEFORE DAVIDSON, J.

THE KING v. JANNEAU.

Summary conviction—Consent of accused to dispense with written depositions—Validity of consent—Cr. Code (1892), *secs.* 843, 856—*Revised Cr. Code* (1906), *secs.* 711, 721.

1. A consent expressly given by the accused and noted in the record of proceedings upon a trial under the summary convictions clauses (Revised Code, secs 705-770), may dispense with the taking down of the depositions in writing.

DECIDED: February 27, 1907.

Motion on the return of an order in the nature of a writ of certiorari to set aside a summary conviction made by A. E. Poirier, Esquire, one of the recorders of the city of Montreal, on the 6th day of February instant, whereby the defendant, now in close custody, was condemned for that he, the said Janneau, was a loose, idle, and disorderly person, to a fine of $30, and in default of payment thereof, forthwith, to imprisonment for a term of three months unless the said sum was sooner paid.

MONTREAL, February 27, 1907.

DAVIDSON, J.:—The conviction was under sections 207 and 258 of the Criminal Code, 1892. Counsel for the Recorder did not press his initial suggestion that certain provincial statutes controlled the matter. Its validity is objected to on the single ground that the evidence was not taken down in writing. An entry upon the record states that the defendant expressly consented thereto:—"Le défendeur déclare à la Cour qu'il n'exige pas que les dépositions soient prises par écrit."

Issue is taken that such a consent was legally inoperative.

My belief is that this particular point is new. Hence comes a necessity of pursuing its investigation at greater length than would otherwise be necessary.

This Court has jurisdiction.—R.S.Q. 2325, 2329, 2448; C.P. 50; *The Queen* v. *Bougie*, (Mathieu, J., 1899), 3 Can. Cr. Cas. 487; *The King* v. *Mercier* (Andrews, J., 1901), 6 Can. Cr. Cas. 345; *Denault* v. *Robida* (Tait, A.C.J., 1894), 10 Que. S.C. 199; 8 Can. Cr. Cas. 501; *Léonard* v. *Pelletier* (Lavergne, J., 1903), 9 Can. Cr. Cas. 19; *Rex* v. *Morley*, 2 Burr. 1040; 3 Am. & Eng. Ency., 6063.

As to the powers of this Court, in relation to certiorari proceedings based on convictions for indictable offences, see *The King* v. *Marquis* (de Lorimier, J., 1903), 8 Can. Cr. Cas. 346. With all deference, I question some of the conclusions therein reached.

By secs. 590, 593 of the Criminal Code, the depositions on a preliminary enquiry "shall be taken down in writing" and read and signed in the presence together of the justice, the accused and the witness, and at the end of the enquiry read again unless the accused dispenses therewith. Other formalities are specified. Stenography is permitted.

Taschereau's Criminal Code marks the quite extensive part of these sections, which were new. No such express requirements are imposed in relation to a trial with jury, a speedy trial, or a summary trial. But by secs. 843 and 856 they are, for the first time (Taschereau's Cr. Code preface, p. IV.), all statutorily fastened upon summary convictions, with the single exception that witnesses need not sign their depositions.

Previous to the Code, the only direction to the justice was (R.S.C. ch. 178, sec. 45), that he should "proceed to hear the witness." It sufficed if he took minutes of the evidence: and quære whether depositions as taken down by the magistrate's clerk, or otherwise than by the magistrate himself noting the evidence, could be properly authenticated—Paley, Summary Convictions, 136; Tremeear, Cr. Code, 690.

Under the Code, a summary conviction is bad, if made upon evidence not reduced in writing. *Denault* v. *Robida*, 10 Que. S.C. 199; 8 Can. Cr. Cas. 501; *The King* v. *McGregor* (Hunter, C.J., Supreme Ct., B.C., 1905), 10 Can. Cr. Cas. 313. And if not also taken in the presence of the magistrate: *Rex* v. *Traynor* (Wurtele, J., Q. 1901), 4 Can. Cr. Cas., p. 410.

I refer in a moment to other cases of like tenor. It is obvious, therefore, that the conviction before us cannot stand unless the consent of the accused discharged the recorder from taking down the depositions in writing, and otherwise obeying the requirements of secs. 843, 856, 590, 591, 593.

The King v. *Brooks* (Ct. of App., Ont., 1906), 11 Can. Cr. Cas. 188, creates the impression that if specific consent had been given at a speedy trial to the reception of depositions taken in another prosecution, such consent would have availed to regularize their admission and use.

Osler, J., said (at p. 191):—

> "It is not a little singular that although the prisoner seems to have been represented by counsel at the trial, no consent by that counsel to the admission of the depositions taken at Harmon's trial appears to have been given or asked for."

In *Regina* v. *St. Clair* (Ct. of App., Ont., 1900), 3 Can. Cr. Cas. 551, an express consent was given by the accused as to the admission of certain evidence. The conviction for being an inmate of a bawdy house was made under secs. 783 and 784 of the Criminal Code, part LV., "Summary trial of indictable offences." A certiorari was issued in aid of the habeas corpus, and motion for the discharge of the prisoners having been refused, this appeal was taken pursuant to R.S.O. ch. 83, sec. 6. According to the magistrate's return to the certiorari, the prisoner and solicitor consented that the evidence given by the witness on the hearing of a charge against one Macdonald for being the keeper of a house, should be read and taken as having been given pro and con on the charge against the appellant

herself, if and so far as such consent could warrant the magistrate in acting upon it. It was now urged that the consent, as given, could not make the depositions on the Macdonald charge evidence against her.

Osler, J., rendering the judgment of the Court, and citing supporting authorities, said (at p. 554):—

> "I am of the opinion that the consent was effectual to admit the depositions in the Macdonald case as evidence on the charge against the appellant. Under the former convenient classification of crime as felonies and misdemeanours, the abolition of which, I think for my own part, is to be regretted, such a charge was a misdemeanour simply, and the competency of the accused or her counsel to make admissions at the trial for the purpose of the trial is undoubted (p. 556). Sec. 690 of the Code now concedes the principle to a limited extent, provided that any accused person on his trial for any indictable offence, or his counsel or solicitor, may admit any fact alleged against the accused so far as to dispense with proof thereof. This, perhaps, hardly goes far enough for the purpose of the present case. See *Regina* v. *Ray* (1890), 20 Ont. Rep. 212."

When the prisoner consented that the depositions of non-resident witnesses taken before the trial should be read in evidence at the trial, such consent was a waiver of more formal proof, and was binding on the prisoner: *Wightman* v. *The People* (Supreme Ct. N.Y., 1873, Barb. 44). In Roscoe, on Criminal Evidence, 12th ed. p. 120, it is said:—"In cases of misdemeanours, evidence may be taken by consent."

Held, in *Regina* v. *Hazen* (Ct. App. Ont., 1893), 20 Ont. A.R. 633, that the provision of sec. 857, that "no such adjournment shall be for more than eight days" is a matter of procedure and may be waived, and a defendant who consents to an adjournment for more than eight days cannot afterwards complain in that respect. There may be waived by an accused the rights given by statute, such as to have a copy of the indict-

ment, a list of the jurors or of witnesses, and of submitting to evidence by depositions instead of meeting the witnesses against him face to face: 1 Bishop, Criminal Procedure, Nos. 126, 959(3), 1204.

Where many are indicted for a riot they may move that the prosecutor shall try only a few of them, the rest entering into a rule, if they are found guilty, to plead guilty too: Bishop, Criminal Procedure, No. 125; Anonymous, 3 Salk. 317; *Regina* v. *Middlemore*, 6 Mod. 212.

In *Queen* v. *Gibson* (Supreme Court of Nova Scotia, 1896), 3 Can. Cr. Cas. 451, it was held that an accused may, upon a preliminary enquiry, waive the preliminary examination into the charge and consent to be committed for trial without any depositions being taken. Meagher, J., said (at p. 461):—"Nor is there any provision enabling an accused party to waive the preliminary examination and consent to be committed for trial. Such a course would, however, I suppose, be open to the accused."

These examples of effective waiver are illustrative only. The case of Graham comes the nearest to the point under consideration. They, however, by analogy, all confirm me in the belief that when the person of the accused and the subject matter of the charge are within the cognizance of the tribunal a consent, which affects procedure only, will, in the absence of any special circumstances forbidding it, establish a legal waiver. Summary convictions are not to be set aside "in consequence of any defect of form whatever." Sections 882, 896. The relevancy and completeness of the evidence heard is not challenged. A witness for the defence was examined. I conclude that the consent given by Janneau was effective in law. Motion rejected.

Conviction sustained.

L. Houle, for the defendant.

Ethier, Archambault, Lavallée, Damphousse, Jarry & Butler, for the City of Montreal.

[SUPERIOR COURT FOR THE PROVINCE OF QUEBEC.]

DISTRICT OF MONTREAL.

BEFORE DAVIDSON, J.

THE KING v. GOULET.

Summary conviction—Plea of guilty—Examination of informant—Deposition not reduced to writing—Plea dispensing with necessity for written deposition—Certiorari without habeas corpus not a process for discharge of prisoner—Cr. Code 1892, *sec.* 843, 856—*Revised Cr. Code* 1906, *secs.* 711, 721.

1. In a summary conviction matter in which the accused pleads guilty whether before or after the examination of the informant, the failure to take down the depositions in writing is not a ground for quashing the conviction.

2. Where a person summarily convicted is in custody under the conviction, habeas corpus is the appropriate remedy by which to obtain his discharge for an irregularity appearing on the face of the proceedings, and an order for discharge will not be made in certiorari proceedings taken without a writ of habeas corpus.

MONTREAL, February 27, 1907.

DAVIDSON, J.:—On a plea of guilty of being a loose, idle, and disorderly character, the defendant Goulet was sentenced by L. W. Sicotte, acting recorder, to six months' imprisonment. An entry on the back of the information makes it appear that the informant was examined as witness. It is objected that the conviction is bad because the evidence was not taken down in writing.

By sec. 856 of the Criminal Code, 1892, if the defendant admits the truth of the information and shews no sufficient cause why he should not be convicted, the justice shall convict him accordingly. The plea of guilty, whether made before or after whatever examination there may have been of the infor-

mant, dominates the matter. The conviction is, in terms, based upon it alone.

It is noticeable, as a matter of procedure, that neither in this case nor in *The King* v. *Janneau* (*ante* p. 360) was a writ of habeas corpus sought for. Application for its issuance is essential to the obtainment of the discharge of a prisoner. Motion rejected.

Conviction sustained.

L. Houle, attorney for plaintiff.

Ethier, Archambault, Lavallée, Damphousse, Jarry & Butler, attorneys for the City of Montreal mise-en-cause.

[COUNTY COURT JUDGES' CRIMINAL COURT, NEW WESTMINSTER.]

BEFORE HIS HONOUR JUDGE BOLE.

THE KING v. HONG GUEY et al.

Selling lottery tickets—Order of search for gambling paraphernalia—Finding lottery tickets and equipment—Statutory presumptions—Onus of proof not placed on defence—Revised Cr. Code (1906) *secs.* 236, 641, 985.

1. The finding of lottery tickets and other paraphernalia of a lottery on the premises entered under a search order for instruments of gaming does not in itself constitute a *primâ facie* case nor shift the onus of proof to the defence.

2. Section 985 of the Revised Criminal Code which declares that the finding of instruments of gaming upon an order of search under Code sec. 641, shall constitute *primâ facie* evidence that the place is used as a common gaming house and that play was going on, has no application to a charge under section 236 for selling lottery tickets.

DECIDED: April 15, 1907.

The defendants were charged before the Police Magistrate of

the city of New Westminster for selling lottery tickets, and were by him sent up for trial for that offence (Revised Code, sec. 236).

The case now came on for trial without a jury before Bole, J., in the County Court Judges Criminal Court.

The evidence shewed that the Chief of Police of the city had laid an information under section 641 of the Revised Criminal Code, 1906, that the premises of the defendants were used as a common gaming house as defined in sections 226 and 227 of the Code, and that the Police Magistrate had granted his warrant, in accordance with the request to enter such premises, and authorized the Chief of Police "to take into custody all persons found therein and to seize all tables and instruments of gaming and all moneys and securities for money in said house or premises and to bring the same before me or such other magistrate or justice of the peace having jurisdiction in and for the said city to be further dealt with according to law."

When the Chief of Police attempted to give evidence of what he had found and seen when he entered the premises under this warrant, Mr. Howay for the defendants objected to the reception of the evidence and the case is reported on this point alone.

Mr. Howay argued that section 226 *et seq.*, dealt with common gaming houses; section 236 with lotteries. That section 641 and its various sub-sections drew a plain distinction between gaming houses and places where a lottery was being conducted and that having entered the place as being a common gaming house the evidence could only be used on a charge under sections 228 and 229 for keeping a gaming house and further, that by section 985 the evidence was *primâ facie* evidence only upon such a charge; and there being no corresponding section in reference to a charge under section 236 the evidence could not be used on a lottery charge and that the provisions of section 641 as to lotteries only contemplate the seizure and destruction of lottery tickets.

Mr. Gray for the Crown contended that a place where a lottery was carried on was a common gaming house under *R.* v. *France*,

1 Can. Cr. Cas. 321, and that the warrant was sufficient; and that section 985 made the fact of finding lottery tickets and other paraphernalia of a lottery *primâ facie* evidence of a lottery being carried on so as to shift the burden of proof on to the defendant and that in the present case if the Court is against his contention the Crown must enter a *nolle prosequi*.

NEW WESTMINSTER, B.C., April 15, 1907.

BOLE, J.:—While it may be that the evidence of the Chief of Police as to what he found and saw in the defendants' house is admissible, still the question for my decision is: Is that evidence (and I gather from the depositions what it is) *primâ facie* evidence that a lottery was carried on by defendants as it would be under section 985 as to the offences under sections 228 and 229 so as to shift the burden of proof from the Crown to the defendants. In the absence of any binding authority it seems to me, inasmuch as the doctrine of the common law is that every man charged with a criminal offence is presumed to be innocent until his guilt is demonstrated by appropriate legal evidence, one must apply every statutory inroad upon that time honoured and humane rule with great caution, limiting every statute which gives a prosecutor an advantage over a defendant strictly to the class of cases to which it clearly applies without attempting to extend its operation any further than the words used by the Legislature would expressly warrant.

I think, after hearing the able arguments of the learned counsel for the defence and bearing in mind the wording of sections 641 and 236 as also the fact that the warrant under which the Chief of Police entered the place had no reference to a lottery, I must hold that the only evidence proposed to be led by the Crown, namely, the finding of lottery tickets, etc., in the *locus in quo* is not *primâ facie* evidence against defendants under section 985.

The Crown, therefore, asked leave to enter a *nolle prosequi* and defendants were discharged.

Defendants acquitted.

Note: *Lottery search order—Order to confiscate money and destroy appliances—Rev. Cr. Code. sec.* 641.

As applied to lottery offences, sec. 641 of the Code makes the following provision:

641. If the chief constable or deputy chief constable of any city, town, incorporated village, or other municipality or district, organized or unorganized, or place, or other officer authorized to act in his absence, reports in writing to any of the commissioners of police, or to the mayor or chief magistrate, or to the police stipendiary or district magistrate of such city, town incorporated village, or other municipality, district or place, or to any police, stipendiary or district magistrate having jurisdiction there, or if there be no such mayor, or chief magistrate, or police stipendiary or district magistrate, . . . to any justice, having such jurisdiction, that there are good grounds for believing, and that he does believe that any house, room or place within the said city or town, incorporated village or other municipality, district or place is . . . used for the purpose of carrying on a lottery, or for the sale of lottery tickets, or for the purpose of conducting or carrying on any scheme, contrivance or operation for the purpose of determining the winners in any lottery contrary to the provisions of section 236, whether admission thereto is limited to those possessed of entrance keys or otherwise, such commissioner, mayor, chief magistrate, police stipendiary or district magistrate or justice may, by order in writing, authorize the chief constable, deputy chief constable, or other officer as aforesaid, to enter any such house, room or place, with such constables as are deemed requisite by him, and, if necessary, to use force for the purpose of effecting such entry, whether by breaking open doors or otherwise, and to take into custody all persons who are found therein, and to seize, as the case may be . . . all instruments or devices for the carrying on of such lottery, or of such scheme, contrivance or operation, and all lottery tickets, found in such house or premises, and to bring the same

Note—*Continued.*

Lottery search order—Order to confiscate money and destroy appliances—Rev. Cr. Code, sec. **641.**

before the person issuing such order or any justice, to be by him dealt with according to law.

(2) The chief constable, deputy chief constable or other officer making such entry, in obedience to any such order, may, with the assistance of one or more constables, search all parts of the house, room or place which he has so entered, where he suspects that . . . any instruments or devices for the carrying on of such lottery, or of such scheme, contrivance or operation, or any lottery tickets, are concealed, and all persons whom he finds in such house or premises, and seize . . . any such instruments or devices or lottery tickets as aforesaid, which he so finds.

(3) The person issuing such order or the justice before whom any person is taken by virtue of an order under this section, may direct . . . any such instruments or devices for the carrying on of a lottery, or for the conducting or carrying on of any such scheme, contrivance or operation, or any such lottery tickets so seized as aforesaid, to be forthwith destroyed, and any money or securities so seized shall be forfeited to the Crown for the public uses of Canada.

The Parliament of Canada has the constitutional power to authorize a magistrate to adjudge forfeiture to the Crown of moneys, etc., found under a search order, and the judgment of confiscation is not an interference with "property and civil rights," the jurisdiction in regard to which belongs to the provinces, although the party claiming the money was not a party to the proceedings in which the confiscation was decreed. *O'Neil* v. *Attorney-General* (1896), 1 Can. Cr. Cas. 303 (S.C. Can.).

The search order should be executed promptly for it never was intended that after a complaint made and an order for search given, the order should be filed away without any attempt to enforce it for years, and yet it remain operative. The premises may no longer be used for an improper purpose and "*it* would be contrary to justice that the stringent provisions of this section should be put in force when or how the police thought proper." Per Drake, J., in *R.* v. *Ah Sing* (1892), 2 B.C.R. 167.

[COURT OF APPEAL FOR ONTARIO.]

BEFORE MOSS, C.J.O., and OSLER, GARROW, MACLAREN AND MEREDITH, JJ.A.

THE KING v. CENTRAL SUPPLY ASSOCIATION, LIMITED.

Trade combines—Conspiracy—Indictment of two corporations as joint conspirators—No personal defendant—Motive—Evidence to explain corporate acts—Corporation taking over illegal business of prior unincorporated association—Illegal combine the object of incorporation—Cr. Code, 1892, sec. 520—Revised Cr. Code, 1906, sec. 498.

1. Two or more corporations may be indicted for conspiracy in furtherance of a trade combine under sec 498 of the Revised Code, 1906, without joining a personal defendant.

2. For the purpose of proving the motive and effect of certain corporate acts, evidence is properly admissible on a charge of conspiracy laid against two corporations, to shew that the formation and operation of an illegal trade combine was the object of the incorporation of each of them, and that the formal agreements whereby the property and assets of unincorporated trade associations were respectively assumed by them, were made in furtherance of that design.

3. Evidence of the nature of the conspiracy alleged may be given before proof of the criminal agreement.

ARGUED: November 12 and 13, 1906.
DECIDED: March 14, 1907.

THIS was an appeal by the defendant, the Central Supply Association of Canada, Limited, from the judgment of Clute, J., delivered at the close of the case, finding it and the Master Plumbers and Steam Fitters Co-operative Association, Limited, guilty upon an indictment for conspiracy or unlawful trade combination, under sec. 520 of the Criminal Code, 55-56 Vict. ch. 29 (D.), and imposing a penalty of $5,000 upon each of the defendants.

The judgment of Clute, J. (December 9th, 1905), was as follows :—

CLUTE, J.:—I think an offence has been proven against the defendants for conspiracy under sec. 520 of the Code, and I find the defendants guilty of the offence charged.

As the matter may go to appeal, there being a special provision for an appeal in this case, it may be desirable that I should mention some of the grounds which have led me to the conclusion that the defendants are guilty.

A preliminary objection was taken by Mr. Watson that there could not be a conspiracy between two incorporated companies, and that that particular case was not in contemplation or governed by sec. 520 of the Code. I entirely disagree with that view. I think to take a view of that kind would destroy the intention of the Act, and be contrary to its clear intendment. Under sub-sec. (t) of the interpretation clause, sec. 3, of the Code, "person" is defined to include amongst others "bodies corporate." I think that was the clear intention of the Legislature. So that I find, first, that there may be a conspiracy between two corporate bodies.

But it is said, in the second place, that an incorporated company cannot be bound by any acts or circumstances which preceded its incorporation, and that the defendants the Central Supply Association of Canada, Limited, not having been incorporated until September, 1905, all the evidence and facts prior to that can have no bearing upon that company, and that nothing appears since its incorporation which would amount to a trade combination within the Act. I do not take that view. I think the evidence clearly established that there has been a criminal combination within the Act since at least the year 1902, and that the defendants, the present companies, are the successors to that criminal agreement and combination, have adopted it and have become responsible for it, and by their engagements have undertaken to carry out the engagements of the association which previously existed, and that that also applies to the incorporated Master Plumbers and Steamfitters Cooperative Association, Limited.

In order to understand in some degree what the relation of these two corporate bodies is to each other, what their object was in in-

corporation, and how they have attempted to carry out that object, it will be necessary to trace the history of the associations of which they are the successors, whose rights and obligations they have distinctly assumed, and whose previous acts they have implicitly adopted by appropriating the funds which the previous associations obtained, and by undertaking to carry out their obligations. Taking the Plumbers' Association first. That seems to have been formed about 1895; but without dealing with the earlier records, and referring to the minutes as they appear subsequently to 1902, we find that a committee, as early as November 24th, 1902, reported with respect to prices, and that those prices at that time were nearly 100 per cent. above or nearly double the prices which were paid to union men.

It is impossible to read the minutes of the two associations from that time down, one apart from the other, because they continuously have relation to each other, and relation to an agreement that undoubtedly existed between those associations. It will be idle to quote from the minutes the numerous passages that sustain that view. A few references may be made. Reference is made as early as January, 1903, to non-union plumbers that are carrying on plumbing business without a proper business place. One of the members spoke with reference to this report and told the meeting that if it was possible they would have another meeting with the supply men before the next regular meeting. Communications were then read at a subsequent meeting from the various supply houses, and a committee was appointed to deal with the matter at once, and a special meeting was called. All that would be unintelligible, perhaps, from the minutes themselves, were it not that what took place subsequently shewed clearly what it had reference to. There was an arrangement, the exact nature of which is not disclosed, existing between the two associations at this time, and the negotiations that took place had relation to the perfecting of that arrangement. The final agreement that was reached we have before us. That is called the agreement of 1903, agreed to on May 6th. Before referring to the terms of that agreement, it may be convenient to look at the minutes as evidencing the fact that an

agreement was understood before that, but that its terms were not explicitly set out, had not perhaps been agreed to by all the members of the Supply Association; but on referring to the minutes of April 6th, 1903, I find it stated that a discussion arose that all members were not charging the 20 per cent. increase "as we had agreed to." It was generally discussed and a conclusion reached that until "we got our secretary and got all new members to properly understand what we were trying to do it would be hard to get it in every instance." Then on April 25th it was moved and seconded "that the time for sending in the notices of jobs to the secretary start on May 4th, and that on and after that date all notices be handed in to the secretary in accordance with the new rule; that a circular be issued to all the members that his office would be open on and after May 4th, and that they would call on him to receive the book and instructions;" and then a very important clause in regard to tenders, that members notify the secretary of all tenders submitted by them prior to May 4th; and on May 6th, the date when it is said the agreement came into force, we find that it was decided to have only necessary typewritten copies of price lists for supply houses, and that lists be not printed until further additions, that the secretary prepare lists of members and mail to each supply house that had signed the agreement, and calling their attention to the fact that the agreement went into effect on May 6th, and on motion of Mr. Armstrong, seconded by Mr. Wilson, the report was adopted and the committee discharged, that is the committee that had had in charge the negotiations which resulted in the agreement which was finally assented to on May 6th.

That agreement declares amongst other things and sets forth that negotiations have been under way for some months between parties hereto with a view to improving the condition of the trade generally and to protect the Master Plumbers and Steamfitters Association by giving the association a preference over non-members, and all plumbing and steamfitting goods purchased from the undersigned firms.

In other words, here is a plain intimation of the object of the

negotiations that had taken place between these two associations, and that the object was simply the carrying out of what had previously existed in less perfect form for some time, probably for over a year prior thereto, as evidenced from the minutes of both of those associations. The agreement provides that the members of the Master Plumbers and Steamfitters Association will endeavour to buy all goods for their work from, and will give the preference on all purchases where prices are equal, to the jobbing and supply houses signing this agreement; that the undersigned supply house will not sell to the general public plumbing goods, steam, hot-water, or gas fittings, but when prices are asked from them they may quote parties wanting an idea of cost not less than 25 per cent. over the association price, and that the undersigned supply houses will not sell plumbing goods or steam-fitting, hot-water, or gas fittings except steam and pipe fittings, to the trade generally except at the advance of 20 per cent. upon the prices quoted to members of the Master Plumbers and Steamfitters Association, and that they will give the said plumbers in good standing, unless otherwise notified by the association, a preference of 20 per cent. on all purchases made by the said members better than the figure at which they will sell a like quantity and quality of similar goods to persons in the trade who are not members of the Plumbers and Steamfitters Association. It is interesting to notice how that was received by the association. It was evidently a matter of considerable time before the agreement evidenced by the one read was reached, and I find in the minutes of May 21st that communications were received from the Robertson Company, the Ontario Lead and Wire Co., and the Webb Manufacturing Co., acknowledging receipt of a copy of the agreement and of the price list. The agreement went into effect, and was acted upon by both parties until October 26th, 1904. Reference is constantly made in the minutes shewing the endeavour to enforce that agreement, and the difficulty that was had from time to time to enforce it, and the complaints that were made and the excuses that were given, but speaking generally it was fairly successfully enforced, and I find as a fact that the effect of that agreement was a contravention of sec. 520 of the Code.

But it is said that that agreement was abrogated in October, 1904. Therefore it is necessary to see what was done on that occasion. Turning to the minutes of October 26th, 1904, we find an extraordinary state of affairs. The first thing that takes place is: "Clause 1 was then read, which was to the effect that every member by solemn oath renew his obligation and allegiance to the association, promising fidelity and faithful obedience to the by-laws." Clause 2, "that the agreement or understanding between manufacturers and supply men and our association as to giving preference to members of our association be abrogated, and that the manufacturers and supply men be given a free hand. Each member present signified his individual intention to purchase goods of manufacturers and supply men who sell to fellow-members of this association in Toronto and vicinity." It may be noticed here that after this agreement was abrogated a new method was adopted, and that was the method which is not clearly set forth, but still, in the light of what took place, is intended by the latter part of clause 2, which states "that each member present signified his individual intention to purchase goods of manufacturers and supply men who sell to fellow-members of this association in Toronto and vicinity." What I have read is treated as a by-law, and at that same meeting provision is made "that for every evasion or infraction of these by-laws the penalty be immediate expulsion." I do not think there is a shadow of a doubt that the meaning of that was, and it was understood as evidenced by what is said, and, by their subsequent action, and each member there understood it to mean, that the members of the Plumbers Association were to buy from the supply men exclusively as far as that was possible, and that the supply men were to limit their sales to them, because at the same meeting it was moved and seconded that lists of manufacturers and supply men in accord be published and sent to each member. What does that mean? What can it mean except that supply men who were in accord with the Plumbers Association would sell to them only, and they buy from the supply men only. It was further agreed to at the same meeting "that a list of the members be published and a copy sent to each of the manufacturers and supply men, and also to each of

our members," and it states that the following members, naming them, were present and took the obligation—a very large number being present to take that obligation. The supply lists were published and sent as provided by the resolution. They were followed by directions, which were published and sent out accordingly, and we find in these lists and directions that indication was given to the trade, of the supply houses with whom the plumbers are to deal, and the names of the plumbers who are to buy. In other words, the lists in the hands of the members of the supply houses would indicate to them those who were in good standing, and by the stars opposite the names those who are not members or not in good standing in the Plumbers Association, to whom goods were not to be sold, and we find that that system was endeavoured to be rigidly carried out. Of course, for the purpose here, it is not necessary that it should be shewn that it was carried out or that it was put in force—the mere combination was sufficient; but as a matter of fact it was so enforced, and so rigidly enforced, that numbers of plumbers who were not members of the association found it impossible to obtain goods except by a roundabout way through other members of the association or by importing them from the United States. I find as a fact that the effect of these proceedings which were carried on by these two associations down to the time of incorporation was a contravention, and was a continuance of that combine and agreement in contravention, of the Act. Then in the spring, I think it was in April of 1905, the Plumbers Association became incorporated and the name then adopted was the name of the defendants, and at the time of the incorporation all the assets and property were transferred from the association to the incorporated company, and the members who became the incorporators were the members of the old association. In other words, the Plumbers Association was the identical organization, including the same members, with the same objects, and adopting the same methods, and was absolutely continuous with the old unincorporated association, and I find as a fact that they did adopt and continue all the methods which had been adopted by the old association to carry out the combination and scheme which was then in existence

between them and the Supply Association. The Supply Association continued unincorporated until September 6th, but proceedings were taken for that incorporation in August. The letters from the solicitors and the minutes in their books clearly shew the object of such incorporation, I think. Something had occurred to disturb the felicity of these two companies in the spring. When it was found that certain plumbers could not obtain goods in the market because of this combination, representations were made to the Minister of Customs, and it became necessary then to represent and to make it appear that sales could be made, and were in fact made to any person legitimately in the trade. At first the Supply Association only attended the interview with the Minister of Customs. This gave offence to the Plumbers Association, and a subsequent interview was obtained, and the result of that interview appears to have been entirely satisfactory; but there was the shadow hanging over them, the danger was manifest. It became perfectly apparent that if it were known to the Government that matters were as they were, there was danger that what is known as the "dumping clause" might be so far as they were concerned withdrawn, and goods permitted to come in from the United States with the duty removed. How was that to be got round? What was to be done so that a way out for a conscience accustomed to what had occurred in these associations might be able to represent and say without manifest falsehood that they could sell to any plumber and so evade the law? I find that the scheme adopted, the plan introduced and carried out, and carried out, as it appears to me, clearly for that purpose, was that the Plumbers Supply Association should be incorporated, that they should pass a resolution which was known as the "Chicago Trade Resolution," that that should be put forward, that they would sell to all legitimate plumbers, and that that representation should stand them in stead in case there was any difficulty in regard to the customs. But when that was made known to the plumbers, the plumbers would have none of it, unless something was done to still secure them the advantage which they had enjoyed of being the persons, or the principal persons, to whom the Supply Company would sell, and so

negotiations commenced. During all this time I find that the existence of this combination continued, that it was being observed as well as it could be under the circumstances, that both parties relied upon it, and that while making a pretence, for use at Ottawa, that they were selling to every one equally, as a matter of fact the very firms that were engaged in this business, and who formed the association of plumbers' supplies, were refusing applications of persons who sought to purchase their goods because they were not members of the Plumbers Association. Then it was thought that if an arrangement could be made by which the Supply Association could become incorporated, it could do what the individual members dare not do, lest they lost the sight of having American goods shut out by reason of the tariff, and in that way they might be able to compass their purpose and still satisfy the Plumbers Association, still retain the plumbers for their best customers, and the Plumbers Association still look to them to sell only to them. How was that carried out? The scheme was ingenious; but having a knowledge of the facts that had preceded and of what followed, it was perfectly clear as to the intendment.

An agreement between the defendants, known as exhibit 47, was prepared with great skill and care, and was approved of by a resolution of both companies, and that provided and declared: "The Supply Association agree to pay to the Co-operative Association a commission of 7½ per cent. on all purchases that shall be made by members of the Co-operative Association from members of the Supply Association, this commission to be payable every three months to the secretary of the Co-operative Association, the first payment thereof to be made in four months from the date hereof and to be for the first three months."

Clause 2 provided: "The Supply Association agrees to create and maintain a fund equal to five per cent. of the amount of all sales that shall be made to the master plumbers and steamfitters in the city of Toronto who are not members of the Co-operative Association, which fund shall be at the disposal every six months of the joint committee hereinafter provided for." The meaning of that is, that while the Supply Association was not manufacturing, did not

own any goods, was not in the business, they undertook to make this arrangement by which, the price being nominally the same to all, a rebate should be given back to the members of the Plumbers Association who were in good standing, thus reaching the end desired as effectually as in the earlier agreement: provision had been made that any outsiders should be quoted 25 per cent. extra price, and any members who were not of the union 20 per cent. Here the minutes shew, in the course of the negotiations which took place which resulted in this agreement and this understanding, that the plumbers claimed 15 per cent., that after a good deal of negotiations the amount was finally got down to 7½ per cent., but the object and the meaning were the same, and to shew that that was so, the 5th clause provided that: "The Co-operative Association agrees to use its utmost endeavours to procure its members to give members of the Supply Association the option of meeting any *bonâ fide* quotations that may be made by other proposing vendors which are more than 7½ per cent. lower in the aggregate than prices quoted by members of the Supply Association, the secretary of the Supply Association to be satisfied by the Co-operative Association that such quotations are *bona fide*. If after — days from notice of such quotations the members of the Supply Association shall fail to meet them, the obligation of the Co-operative Association in respect of such quotations shall be deemed to have been satisfied."

6. "If any member of the Co-operative Association shall fail or omit to purchase all his goods, less said exemptions, from members of the Supply Association, or shall fail or omit to give members of the Supply Association the option above mentioned, of meeting quotations made by other proposing vendors, the Co-operative Association shall not be entitled, notwithstanding anything hereinbefore contained, to receive from the Supply Association any commission in respect to any sales which shall be made to such member of the Co-operative Association by any of the members of the Supply Association, but if such member of the Co-operative Association shall hereinafter desire to purchase his goods, less said exemptions, from members of the Supply Association, and to give them such option, the Co-operative Association shall, upon satisfactory terms

to be arranged by the said standing committee, be entitled to the commission in respect of sales made to him thereafter."

Then follow a number of other provisions. The meaning of it all was, that, while the Supply Association was pretending that they were putting all master plumbers upon an equal footing, they were distinguishing by giving a direct advantage of 7½ per cent. to all master plumbers who were in good standing in the association, and in addition thereto paying to them 5 per cent. of sales to outsiders. That agreement was ratified, using that word in the minutes, at the meeting of the two associations; and so far an understanding and agreement was complete; but I point out that I regard that not in itself as constituting the combination and the agreement, but only as evidencing the method which they adopted at this time of putting in force and perfecting the agreement, which was continuous, and which had existed during the time I have mentioned before. That brought the parties down nearly to the time when they ceased operations for reasons that were unavoidable, but during that time, and within 6 weeks of the seizure of the books, it is perfectly manifest that the Supply Association was still carrying out through its members the combination which had all along existed for the purpose of favouring the members in good standing in the Plumbers Association, and refusing to sell supplies to those plumbers who were not members of the association. This agreement, then existing and continuous, was one that, I think, had the necessary effect of being an infringement and an offence against the statute, and I think that the Central Supply Association are responsible for all that was done by the Plumbers Association in order to carry out their common purpose, and while they may not have had knowledge of the method of tendering, for instance, they in effect were responsible for that to the extent that that aided the Plumbers Association and themselves in the more effectually carrying out the intention with which they started. A reference, perhaps, may be made to that. One hardly knows how to express one's self in the face of the disclosures such as we had in regard to that matter. A number of hitherto reputable firms, meeting round a table, and under the pretence of sending in invited tenders, deliberately adopt a method by which,

apparently without the slightest compunction, they took from the public, that portion of the public who happened to be interested, money to which they had no possible claim, no more claim than any person has when meeting another in the street he by force robs him of his money. Indeed, I think of the two offences the robbery is the less offensive.

Here they adopted a system of misrepresentation and fraud in order to induce persons inviting tenders to believe that the tenders were reasonable and fair, when from first to last, for at least the last 2 or 3 years, it was admitted in the box that not one single honest tender had come from that association. The system was this, that having come with an estimate which they saw fit to make of the probable expense of material and labour, and having added to that 26½ per cent., and sometimes other additions which I will refer to presently, each put in what was called a tender, not intending that it should go before the architect, not intending that they should be in competition with any others who had made a similar estimate, but, having arrived at these sums, an average was struck, and that was supposed to represent nearly the amount for which the successful tender would be allowed; and then false and fictitious tenders were put in, varying slightly but generally about 10 per cent. above that amount, so as to lead to the supposition that these tenders were honest and real; and in many instances it was evidenced that, not content with these, they put in an additional sum, which was called a rake-off or a bonus, to cover, forsooth, what was called the time and trouble of these gentlemen assembling together in order to do what they had done, and this rake-off was distributed among themselves. I can call it by no other name than so much plunder. Then it was provided that if any one claimed the person seeking a tender as his customer, he should have, in a sense, the first right, but, if his tender was higher than the average, he would have to make an allowance to the other person as a sort of solatium for having lost what he would otherwise have been entitled to; and out of these tenders 5 per cent. was charged in each case for the association. We had here in court some thousands of cases where these cards were put in. Cards were furnished shewing the name of the

architect, address of owner, class of work, where it was situated, when the tenders were closed, and by whom notified, and the address. That was the system, utterly destroying competition, utterly doing away with anything like a fair price. It was shewn in one case that the difference between the average tender and an outside real tender amounted to nearly $6,000. But, no matter whether it amounted to more or less, the system was a fraudulent system. It was a combination carrying out their idea of limiting the trade to themselves, the members of the Plumbers Association, and compelling, by the power which they had, the Plumbers Supply Association to confine their trade exclusively to them. And, not content with what they might do in one city or town, the ramifications of this method extended throughout Ontario and throughout Canada, and, while the similar associations in the United States from which the idea came, were not affiliated with the defendants in the strict sense of the word, I think they were in such close touch with those associations that they attended their principal meetings, and they found the American association ready to assist them at any time they required assistance, either in keeping out goods or in any other way that might render the working of their system more perfect. There have been numerous exhibits placed before the Court in the way of letters and agreements and correspondence, in addition to the evidence shewing how this scheme and combination was carried out. It is useless to embody them in what I have to say. They may be more readily referred to in case the matter should come up hereafter, but I think there can be no doubt that the object of these two associations, now called incorporated associations, was one and the same; it was to do the very thing that this statute was intended to prevent, and by this combination I find that the effect of that was to unduly limit the supplying or dealing in the articles or commodities mentioned, and that it did restrain and injure trade and commerce in relation to such articles and commodities as they either manufactured or sold, and that in fact it did unduly prevent and lessen the manufacture and production of such commodities, and that it unreasonably enhanced the price. There was no competition in price. These manufacturers got together and they fixed their own prices, they

and the persons who would sell their goods, and who were the only persons to sell their goods. They met from time to time and they revised their price list, and they sold those goods at just what price they pleased, only limited by the danger of putting the price so high that importations might come from the United States. There was no pretence at an honest competition, and I find that they did prevent and lessen competition in the production and in the barter and in the sale, and in the supplying of articles and commodities forming their business.

I therefore find the defendants guilty, and I impose as a penalty $10,000, $5,000 on each of the defendants.

The Central Supply Association, Limited, now appealed from the above judgment.

TORONTO, November 12 and 13, 1906.

G. H. Watson, K.C., and *W. W. Denison*, for the appellants, contended that there had been a mistrial, as evidence wholly inadmissible against the appellants had been received, and the result almost necessarily affected; that there was no evidence of conspiracy on the part of the appellants; that no such agreement as was set up in the indictment had been proved, nor was there any evidence of ratification by the corporation of the acts of the individual members of the association; that sec. 520 does not contemplate a combination between two corporations such as alleged here: *Wilson* v. *Hotchkiss* (1901), 2 O.L.R. 261; *Merchants Bank* v. *Lucas* (1889), 15 A.R. 573; Addison on Torts, 7th ed., p. 96; Hibbert and Rafferty on Company Promoters, pp. 18, 35.

J. R. Cartwright, K.C., and *E. E. A. DuVernet*, for the Crown, contended that a conspiracy between the two corporations had been proved; that the appellant association took over what had been going on, and continued it; that the Master Plumbers' Association could not have carried on their schemes without the assistance of the appellants; and that the construction placed on sec. 520 was correct: *Rex* v. *Elliott* (1905), 9 Can. Crim. Cas. 505, 9 O.L.R. 648; Roscoe's Criminal Evidence, 12th ed., p. 372.

Watson, in reply.

TORONTO, March 14, 1917.

MOSS, C.J.O.:—This case has been the subject of much consideration and discussion which, however, resulting in a unanimous conclusion

For myself I may say that but for the opinions to the contrary of two of my learned brethren I should have experienced little difficulty in coming to the conclusion that the judgment should be affirmed, and, although not without some distrust of my own judgment, I still retain that opinion.

I agree that the appellants are to be judged and condemned, if condemned at all, upon acts proved to have been committed by them after incorporation.

But in weighing and estimating these acts and endeavouring to arrive at a proper conclusion as to their purpose and effect, I think we may look at the immediately or proximately antecedent acts of the individuals who now comprise the corporation and direct its operations. We may thus be aided in forming a judgment as to the motives which led to the incorporation and the ends and purposes intended to be accomplished by it.

What was the purpose of the incorporation?

The association has no stock in trade; it carries on no business; it does not buy or sell commodities; it does not profess to be an association formed for general benevolent purposes, and it can scarcely be regarded as a social club.

There had been an unincorporated association in existence for some years before and up to the time of the incorporation. The certificate of incorporation issued on September 9th, 1905. There was a special meeting of the association on September 12th at which resolutions were passed which indicated with tolerable plainness the objects with which it had been incorporated, *viz.*, to perpetuate a system of agreements, arrangements and understandings formerly in existence between the Master Plumbers Association and the unincorporated Central Supply Association. And this was further shewn at a meeting of the trustees on September 27th, when it was resolved that the objects and purposes of the association

were similar to the objects and purposes of the unincorporated association, and that it was desirable to acquire all the latter's rights and assets. It was further resolved to purchase and acquire from the latter all its rights, property, assets, etc., and to take a transfer thereof and in consideration therefor to issue to each member of that association who had paid $25 entrance fee one share fully paid in the capital stock of the association. This resolution was carried into effect by the transfer of assets and issue of shares as provided. And we thus find the incorporated body formed for the same objects and purposes, and composed of the same members and possessed of the same property and effects as the unincorporated association.

Then there is evidence of corporate action resulting in an agreement with the Master Plumbers Association and acted upon by both bodies upon which the learned trial Judge was justified in coming to the conclusions he did and in finding the appellants guilty of the charge on which they were tried. I agree with his conclusion on the facts. And I also agree that the correct reading of sec. 520 of the Code as amended by 63-64 Vict., ch. 46 (D)., is that adopted by the learned Judge. But it may well be said that there is room for improvement in the language, and that it is desirable to set at rest all doubts as to the intention of Parliament with regard to the matter.

I would dismiss the appeal.

OSLER, J.A. (dissenting) :—It cannot be too strongly insisted upon nor too clearly borne in mind that the appellants are not responsible for anything which took place before their incorporation on September 9th, 1905. They are not heirs of the sins or answerable for the misdeeds of their unincorporated predecessors. For all of these the members of the unincorporated association are liable, and have been prosecuted. The Crown had the right to prove the object of the incorporation and acts done after incorporation as tending to prove a conspiracy between the two corporations, but the fact of incorporation alone would not be enough.

The prosecution, however, went very far afield, introducing evidence, which comprises the bulk of the record, of unlawful acts committed by individuals, members of the old unincorporated associations, years before these defendants came into existence. This in my opinion was absolutely wrong, and no one can read the judgment of the learned trial Judge, in which these acts are referred to and commented upon at length, and with the indignation which they were well calculated to provoke, without seeing how much they affected the result of which the defendants complain. The consequences to them are so serious, involving as they do the imposition of an enormous fine, that the very least relief to which they are entitled is a new trial, if that relief can be granted under 52 Vict. ch. 41, secs. 4, 5 (D.). But in my opinion the evidence of anything finally done or completed by these defendants after their incorporation, if any evidence of that kind there be, is of so slight and flimsy a nature that the learned trial Judge, dealing with a criminal charge of so grave a character, ought to have held that the case was not made out, and should have acquitted the defendants.

The ends of justice were abundantly satisfied by the prosecution of the individual offenders who had reaped the benefit of their wrongful acts, and it is difficult to see why the Crown should have deemed it worth while to prosecute the corporation which only came into existence at a time when it was becoming apparent to every one that the transactions in which their predecessors and those who promoted the incorporation had been engaged, were of doubtful validity, and were ceasing to be carried on with the energy which had made them so profitable in the past. I cannot say that I feel any doubt, other than what one is naturally pressed with when differing from other members of the Court, that the conviction is bad and that the appeal should be allowed.

Upon the question of the construction of sec. 520 of the Code (now sec. 498 of R.S.C. 1906, ch. 146), namely, whether the word "person" in the sixth line of the section includes a corporation, having regard to the context and to the interpretation clause of the

Code, sec. 3 (t), and R.S.C. 1906, ch. 1, sec. 34 (20), I express no opinion. It will be easy during the present session of Parliament to amend in this respect a very loosely drawn section.

GARROW, J.A.:—The defendants were charged by indictment with a conspiracy in restraint of trade under sec. 520 of the Criminal Code; and at the trial before Clute, J., without a jury, were found guilty, and each fined the sum of $5,000.

The defendants, the Plumbers Association, paid the fine, and the other defendants the Supply Association, appealed.

The facts are very fully set out in the judgment of Clute, J.

Section 520, as amended by 63-64 Vict. ch. 46 (D.), reads as follows: "Every one is guilty of an indictable offence and liable to a penalty not exceeding four thousand dollars, and not less than two hundred dollars, or to two years' imprisonment, or, if a corporation, is liable to a penalty not exceeding ten thousand dollars, and not less than one thousand dollars, who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat or transportation company . . . (d) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property."

The learned counsel for the appellants contended that under this language an indictment would not lie against any corporation but those named in the section, upon the principle of the maxim *expressio unius est exclusio alterius*. And that in any event two corporations alone could not be indicted, or in other words, that there must in addition be at least one natural person as a co-conspirator.

These objections are not, I think, well founded.

There are of course offences, such as assaults, which it is physically impossible for a corporation to commit, but for such offences as they can commit, whether of misfeasance or malfeasance, and for which the prescribed punishment is one which they can be made to endure, they are as amenable to the criminal law as are natural

persons: see *Queen* v. *The Great North of England R.W. Co.* (1846), 9 Q.B. 315; *Queen* v. *Tyler and International Commercial Co.*, [1891] 2 Q.B. 588-594; *Pharmaceutical Soc'y* v. *London and Provincial Supply Association* (1880), 5 App. Cas. 857.

The section in question expressly provides for the punishment of a corporation by fine, and this seems to place them on the same plane for all purposes under the statute as natural persons. See also the interpretation clauses of the Code, 55-56 Vict. ch. 29, sec. 3, sub-sec. (t) (D.), and the General Interpretation Act, R.S.C. ch. 1, sec. 7, sub-sec. 22.

As to the remainder of the objection, any doubt is of course created by the naming of the transportation companies at the end of clause 1. Why this was considered necessary does not clearly appear, but I am wholly unable to regard their presence in the section as having such a far-reaching and controlling effect as to exclude from its operation all other commercial corporations.

The section begins, "Every one" is guilty, etc., and liable to the punishment first prescribed, and then proceeds, "or if a corporation," to the punishment secondly prescribed, "who conspires," etc., with any other person, "or with any railway . . . company," etc.

The clause evidently assumes and provides for the case of a conspiracy between any natural person and a transportation company, and also between any corporation and a transportation company, whether incorporated or not. And this at once appears to render inapplicable the maxim upon which the contention rests.

It is common knowledge that the majority of large operations in manufacturing and dealing in the articles and commodities of commerce are now carried on by joint stock companies. Can it be imputed to the Legislature that the intention in preparing the net was to catch only the small fry? Surely not. Then again, the section expressly extends to prevent combinations in, among other things, insurance, both life and fire. These subject matters, it is also common knowledge, are always carried on by joint stock or mutual companies or corporations. Insurance corporations are not expressly named at all, and therefore, unless included in the

term "corporation" found in the first clause of the section, could not under the construction contended for be either prosecuted or punished.

Mr. Watson also argued that evidence had been improperly admitted against his clients, his objection being apparently twofold, (1) that evidence of the acts of the master plumbers was not admissible as against his clients, and (2) that evidence of the acts and conduct of the parties prior to the incorporation of the Supply Association should not have been received.

And he further contended—his main contention I think it may be called—that in any event no evidence had been given of any corporate act on the part of the appellants after their incorporation.

"Conspiracy is a matter of inference, deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them": *per* Grose, J., in *The King* v. *Brisac & Scott* (1803), 4 East 164, at p. 171, quoted with approval in *Mulcahy* v. *The Queen* (1868), L.R. 3 H.L. 306, at p. 317. See also *Regina* v. *Fellowes* (1859), 19 U.C.R. 48, 57, 58; *Regina* v. *Connolly and McGreevy* (1894), 25 O.R. 151, 1 Can. Cr. Cas. 468.

And it was quite proper and indeed necessary, to give general evidence of the nature of the conspiracy, to shew how it affected trade. The appellants controlled the supply of materials with which the business of plumbing was carried on, and the other association, consisting of the master plumbers using this material, dealt directly with the customers, who are said to have been injuriously affected. And it was therefore the acts and conduct of the latter association and its members which, on the theory of conspiracy, directly made the unlawful object attainable as against the public.

And it is well settled that evidence of the nature of the conspiracy alleged may be given before the necessary criminal agreement is proved: see *Rex* v. *Hammond* (1799), 2 Esp. 719; *Regina* v. *Brittain* (1848), 3 Cox C.C. 76.

The remaining objections above stated are of course directed to this, that however criminal the conduct of the parties had been in the past, the appellants upon incorporation began with a clean

sheet, and could only be connected with the criminal agreement by some distinct subsequent corporate act. And in the paucity of evidence of acts subsequent to incorporation the objection, it may be admitted, is formidable. I have, however, after careful and extended consideration, come to the conclusion that the proper inferences were drawn by the learned Judge at the trial.

The theory of the Crown, apparently concurred in by the learned Judge, is that prior to the incorporation there had been such a criminal agreement, first between the individuals comprising both associations before the incorporation of the Plumbers Association in April, 1905, continued after that incorporation by the defendants the Plumbers Association down to the incorporation in September, 1905, of the defendants the Supply Association, and afterwards to the end between the two incorporated bodies. That there was at one time such an agreement is not disputed. The defendants the Plumbers' Association were incorporated as a co-operative association under the provisions of R.S.O. 1897, ch. 202; the other defendants under R.S.O. 1897, ch. 211. Each association upon incorporation took over the assets, obligations and policy of the previously unincorporated association. The secretary of the unincorporated body, really its manager, was in each case retained in office by the incorporated body, and he continued to use the same books as those in use before incorporation. The large majority of the individuals forming the unincorporated associations in each case continued their connection with the incorporated bodies; and the mode of management was in no material respect changed in either case after incorporation.

The evidence shews that the appellants sought incorporation in the belief as advised that they could with safety do doubtful things as an incorporated body which they could not do without too much risk while unincorporated, no doubt a fear inspired by the circumstances of the Crashley indictment then pending against one of the members, and by the then threatening trouble with the customs department at Ottawa. And it is a perfectly fair inference that the things which it was desired to do, and which indeed were really the only things intended or proposed to be done, were those con-

nected with the continuance of the understanding, or at least of some understanding, with the master plumbers, whereby competition was to be kept down and prices to be kept up, at least to the very verge of the law. No other satisfactory reason is suggested for the appellants' incorporation, nor indeed for its existence as an incorporated or unincorporated body. They did not manufacture or sell any goods themselves, nor carry on or propose to carry on any other business. No difficulty was or can be suggested in the individual master plumbers going to the individual manufacturer or jobber directly for his supplies. But there was more than a suspicious origin. There was proved joint and continuous action towards the same purpose down to the date of incorporation. In July, 1905, the secretary of the Supply Association interviewed a Mr. Reeve, who had been a member of the Master Plumbers' Association, but had withdrawn, and was being punished accordingly, with a view to inducing him to return to the fold. And in the same month a joint deputation from both bodies proceeded to Ottawa to interview the Minister of Customs with reference to the charge which had been made against them of refusing supplies to others than members of the Master Plumbers Association.

Immediately before that there had been friction between the two bodies because the Supply Association had passed a resolution, under pressure, as it stated, from the Minister of Customs, providing that in future they would sell to all master plumbers having established places of business. Why the friction and why the necessity for the resolution at all if there had been no previous understanding of the kind in question?

But after the return from Ottawa no more is heard of the resolution, and no customer was produced nor is there any reliable evidence to prove, that any change had really been affected by or after the resolution. Then the pricing committee, a necessary part of the machinery, continued to sit as usual down to and after the appellants' incorporation, just as before. And in the month of September, apparently after the appellants' incorporation, the secretary of the appellants is found complaining to Mr. Mann that he was not keeping to the agreement not to sell to those not members

of the Plumbers Association. And finally there is at least one distinct instance proved of a master plumber having been refused supplies after the appellants' incorporation by a member of the appellants' association.

Then, there is the unquestioned circumstance that as soon as the appellants' incorporation took place committees of both bodies met by previous arrangement, and with the aid of experienced solicitors proceeded to settle the terms of a written agreement which outwardly at least was proposed to regulate the future relations of these two extraordinary bodies. And in this agreement, as finally settled, although not actually executed, the same idea of harassing the outside master plumber continues, for it is evident that his trade was not to be cultivated. He was to be discouraged as much as possible. For instance, he was not to be entitled to the benefit of the price lists agreed upon for the trade of the more fortunate members, but might be charged any price which pleased the supply men. The members of the association were to receive a discount of seven and a half per cent. on all their purchases. The outsider had no such right. And what is still more strange, the supply men were in addition to pay five per cent. upon all sales made to outsiders to a fund controlled by the parties. And it is safe to assume that this five per cent. was also intended to come out of the pocket of the unfortunate outsider.

With reference to the objection that no express corporate act was proved, it is proper to observe that the offence is of a criminal nature, and concerns the conduct of the defendants. Such conduct could only be proved by proving what those who apparently represented it did. It would have been a good answer to prove that the acts relied on were unauthorized or had been disavowed. But on the contrary, it is quite apparent that the incorporated body existed solely for the doing of exactly such and similar acts, that it had and did no other business, and that but for its connection lawful or unlawful with the Master Plumbers Association it had no reasonable excuse for existing at all.

Under these circumstances, with such a history and origin and apparent purpose, the acts to which I have referred as occurring

after incorporation, although comparatively trifling, were and are, I think, sufficient to uphold the learned Judge's conclusions against the appellants, and the appeal should therefore, in my opinion, be dismissed and the conviction affirmed.

MACLAREN, J.A., concurred with GARROW, J.A.

MEREDITH, J.A. (dissenting):—Bearing in mind the cardinal fact that the appellants were not incorporated until September 19th, 1905, it seems to me impossible to avoid the conclusion that they were tried, convicted and sentenced, in a substantial measure at least, for the offences of others, committed long before the appellants had any sort of legal existence, and so were wholly incompetent to commit any crime or do any lawful act. This is not only apparent from the whole course of the trial, but crops up throughout the reasons given by the trial Judge for finding the defendants guilty; and indeed it is almost, if not quite, explicitly so stated. He almost began by saying that "there was a criminal conspiracy . . . since at least the year 1902, and that the defendants, the present companies, are the successors to that criminal agreement and combination, have adopted it and become responsible for it . . ." A little further on he spoke of the defendants having distinctly assumed "the rights and obligations" of the associations, and of having "implicitly adopted" their "previous acts."

It is very difficult to understand how anyone can by succession, adoption, ratification, or in any other manner become punishable for crimes committed before he was born. If the appellants, after incorporation, became parties to a pre-existing criminal conspiracy that would be a new crime, a new agreement between them and those who were parties to it before; but could in no sense make them guilty of any pre-existing crime, or punishable in respect of any overt acts committed before they became co-conspirators.

But it was contended that the appellants were incorporated for the very purpose of carrying on a criminal conspiracy. Even if that were so, how could it make them criminals, before they had themselves committed any crime? However it may be in nature,

or under any moral law, under the criminal laws of this country the sins of the fathers are not visited upon the children, nor the children's teeth set on edge merely because the fathers have eaten sour grapes. Those who committed any offences before the appellants were incorporated are answerable for them, but neither they nor anyone else can shift the burden upon the appellants. They are answerable only for offences committed by them after their legal birth.

However, as a matter of fact, the appellants were not incorporated for the purpose of carrying on any criminal conspiracy or of committing any sort of crime. They were brought into existence, if at all with the object of restricting trade, with the object of doing so under competent legal advice in such a manner as would be inoffensive to the law. This is made plain in the evidence and is undeniable; nothing was done except under the advice of reputable lawyers; but of course it will not save them if in truth they have committed the crimes imputed to them.

It seems to me to be undeniable, therefore, that the appellants' objection to the admission of evidence was largely well made, and wrongly overruled. No question of intent or motive was involved. No matter what the motive or the intention of the parties, there could be no crime if the effect of their agreement could not unlawfully restrain trade. The character of the agreement the appellants were about to enter into spoke for itself; its purpose was not and could not be denied; it was to go as far as the appellants lawfully might in the way their co-defendants desired. That was quite within their rights, quite unobjectionable in law. The charge made against them is not of a crime *malum in se*, but bad only because prohibited by statute. There are at least some restraints of trade which cannot be considered "undue"; for instance, it could hardly be deemed a crime for retail dealers to take combined action against wholesale dealers selling at retail. I say this because the learned trial Judge seems to me to have been under the misapprehension that all combined action for the benefit of both or either of the defendants, or the associations or individuals before them, must have been illegal, and that no change in the nature of

the agreement could affect its character. But, as I have said before, no matter how carefully the appellants may have endeavoured not to overstep the bounds of legality, they are, strictly speaking, none the less guilty of a crime if their agreement comprehended "an undue restraint of trade" such as they were charged with—if it exceeded the limits of a due restraint of trade. The evidence in regard to the misconduct of the Plumbers Association in tendering—evidence which seems to have moved the learned trial Judge deeply—seems to me to have been especially objectionable. What had it to do, in any way, with the agreement between the two associations, and what had the appellants, in any sense, to say to it? Those who comprised the Supply Association were driven into the agreement by the demand of the master plumbers who formed the association. What interest had the defendants, or the Supply Association, or its members, in restricting their trade? How could the misdeed of the plumbers, of which the supply men had not even any sort of knowledge, affect the defendants or the Supply Association? And yet it seems pretty plain that they have been punished, in the same measure as the plumbers, for it.

On this ground alone the conviction, in my opinion, is vitiated and cannot stand.

I am also of opinion that it is bad for two other reasons: First, because there is no evidence of any concluded agreement—either illegal or legal—on the part of the appellants; and, second, because they are not within the provisions of sec. 520 of the Criminal Code, under which alone they were indicted and prosecuted.

Although the appellants' incorporation is dated as of September 9th, 1905, the company was not organized, nor were any officers of it appointed, nor do there appear to have been any members, unless the person who applied for the incorporation were to be treated as such, until September 27th, 1905: and by the Act under which they became incorporated they were expressly prohibited from commencing any operations until they had agreed upon and formed a set of rules for the regulation, government and management of the association: R.S.O. 1897, ch. 202, sec. 5. Up to that date, and throughout, the negotiations for an agreement with

the Master Plumbers Association were carried on by members of the unincorporated Supply Association; and there is nothing whatever connecting the incorporated society with them, through any duly authorized officer or agent. Nor was there any contract binding upon either of the parties who were actually contracting. It cannot be that either could successfully have sued the other upon the agreement before it was duly executed. It was intended by them throughout that any agreement between them should be in writing, and no such agreement was ever come to; this prosecution intervened and prevented that which would doubtless in a few days have become a completed agreement between the defendants, for no doubt the appellants would have ratified the negotiations and formally have executed the writing, in such a manner as to make it binding upon them, as they might then have done—if it were *intra vires*—being fully organized. During the trial constant efforts were made, fruitlessly, to get from witnesses testimony that whilst these negotiations were going on the parties to the old agreement were acting upon it. But if that had been proved what difference could it have made? The individuals who comprised the old unincorporated association could in no sense make the new-born society answerable for their wrongs. Until the new society was in a position to act itself, and had acted, either directly or through its duly authorized officers, it could not be either civilly or criminally bound. The new agreement was never completed and never bound any one, and the new society, never actually had any part in the negotiations for it. The evidence of acts of individuals who had been members of the association but were not even members of the appellants' society, I would have thought obviously quite irrelevant even if they had been proven to have been unlawful acts, of which there was no sort of evidence.

It is not necessary to consider whether the agreement, if it had been concluded by due execution, would have amounted to a criminal conspiracy.

The mere fact of allowing one class of customers a discount, obviously would not; nor would there be any thing objectionable in several persons joining in their purchases for the purpose of

securing it. No more need be said than that no opinion is expressed upon this question, because it has become quite immaterial.

In order to bring the appellants within the provisions of sec. 520, it is necessary to read the material parts of that section as follows: "Everyone is guilty of an indictable offence . . . who conspires . . . with any other *company*, or with any railway, steamship, steamboat or transportation company . . ." I decline to attribute to Parliament the perpetration of any such nonsense. Read as actually written, it is perfectly plain and intelligible: "Everyone is guilty of an indictable offence . . . who conspires . . . with any other *person* or with any railway, steamship, steamboat or transportation company . . ." Regarding the actual intention of Parliament, there is no room for doubt. If the section were enacted in ignorance of the interpretation clauses, it is manifest that the word "person" was not meant to include a company; it could not in its ordinary sense, and the words following put it beyond any excuse for contending that more than companies of the character mentioned immediately after the word "person" were meant. Whilst if the section were enacted with a knowledge of the interpretation clause affecting it, it is equally manifest that the word "person" was intended to be read in its ordinary sense and meaning only, and not as meaning also a company; otherwise it would be worse than stupidity to have added the words following. Then, knowing beyond peradventure what the intention of the law-makers was, is there anything which compels a construction of their words contrary to their intention, for making those guilty of a grave, and heavily punishable, crime who were never intended to come within the condemnation of the enactment?

The interpretation section of the Code—sec. 3, sub-sec. (t.)—provides, among other things, that the word "person" shall include a body corporate in relation to such things as they are capable of doing; but this provision is, as usual and necessary, limited by the provision contained in the first three lines of the section, "Unless the context requires otherwise." Very obviously, in my judgment, the context does imperatively require otherwise; it is a case of giving effect to the context or of ignoring it altogether—wiping it out of the statute.

But it was said that if that be so the enactment is of little effect. If that were so it would be a matter for the consideration of the law-makers alone. But that that it is not so is very obvious from the fact that the members of the associations, who were guilty of the things proved at the trial, have been indicted and have pleaded guilty and are now awaiting sentence, apparently in order that the judgment of the Court upon them may be modified, or the reverse, according to the result of this appeal. And it was further urged that there could have been no good reason for limiting the enactment to transportation companies only, in addition to individuals. Again it would be sufficient to say that that was a matter for the law-makers alone. But it may be added that it would not be difficult to suggest reasons for such a limitation; for instance, it might have been thought better, at the time when the Act was passed, not to interfere too much with provincial companies, and with property and civil rights, subjects exclusively within the power of the Provincial Legislatures, and to confine the crime, at first at all events, to companies dealing more in matters within federal exclusive jurisdiction, such as things of trade and navigation; or it may have been that then there was no reason or demand for such legislation against other than transportation companies, against which there has always been, within the memory of living men at all events, much complaint, and against which much special legislation, such as the numerous acts respecting public carriers, restricting their rights at common law and imposing obligations and penalties upon them; and who can tell that party politicians' sagacity or fear may not have had some sort of effect? The legislation was extraordinary, the subject was a ticklish one, and sometimes it may be deemed suicidal from a party political point of view to antagonize any particular class of the community. But whatever may have been the motive, or whether there was any, the law must be accepted and administered as it is; and not strained one way or the other merely because in the narrow range of vision and necessarily limited knowledge of any particular Court or any particular Judge, it may seem that some particular case should be brought within, or should be brought without, any particular enactment. And, in the trial

of such a case as this especially, care should be taken that public sentiment, or public resentment, has no sort of sway—that justice is administered wholly unprejudiced by it.

Though the point was not argued, I deem it right to add that, in my opinion, the appellants are not, and never were, an incorporated body, or a legal entity of any character, and so are not answerable to the law; but the members of the association, who were parties to the things complained of, are. Seven persons made a declaration that they desired to form an association under the provisions of chapter 202 of the Revised Statutes of Ontario, entitled an Act Incorporating Co-operative Associations, and filed and registered it. As the purposes of the association were not, in any sense, the carrying on of any labour, trade or business, within the meaning of the Act, there was no incorporation. The making, filing and registration of the certificate had no legal effect. On this ground also the conviction is, in my opinion, plainly invalid.

I would allow the appeal and acquit the appellants.

Appeal dismissed and conviction affirmed.

Note: *Corporations Frauds—Regulation of Trusts and Combines.*

The address of Judge Grosscup of the United States Circuit Court, Chicago, before the National Civic Federation (October 23, 1907) contains an arraignment of the common system of issuing corporation charters without any effectual system of control over the amount of capitalization or of precaution against the future manipulation of its affairs for fraudulent purposes.

Some of his remarks seem as applicable to conditions in Canada as to those in the United States, and are quoted below.

Judge Grosscup spoke on "What should be the structure of the new corporation?" He said, in part:—

"Neither the object for which the corporation is formed, nor the amount of its capitalization, nor the character of the securities issued, commands any preliminary attention other than such as is merely prefunctory. Put your nickel in the slot and take out a charter, is the invitation that the states extend, and in

Note—*Continued.*

Corporations Frauds—Regulation of Trusts and Combines.

line before the slot machine, entitled, too, to an equal place in the line, are the corporate projects conceived to defraud, as well as those that have an honest purpose. Neither is detained by so much as an inquiry.

"For indifference such as that, I would substitute at the threshold of the corporation's application for existence an honest, careful inquiry by some tribunal of government—a tribunal that will act only after it has heard—a hearing in which the public is represented by a district attorney, on whom is thus devolved the duty not merely of pursuing the horse after it is stolen, but of seeing to it that the door is locked before the horse is stolen.

"There is no need that the corporation should initially capitalize a projected success that, if it exists at all, exists only in the future. Let the securities issued on account of success be issued only when success is established; and let them be fairly related, as the enterprise grows, to the increased value of the actual earning power developed. And I can see no reason why in any honest enterprise the question whether additional securities shall be issued, should not be made the subject of judicial inquiry.

"But the restriction of capitalization to figures that are fair will accomplish little if the declaring and paying of unearned dividends be left to those who are in control of the corporations, for it is not on the par value of securities, but upon the size and regularity of dividend payments, that the public makes up its judgment as to values; and it is not on mere capitalization that the schemer in corporate securities counts, but upon his ability to make the public believe that the capitalization has an earning power.

"Take the well known case of some of the Chicago traction companies. Without dividends the securities issued would have remained near zero, and that, too, irrespective of how small the issue was, but with high dividends, paid year after year until they were no longer questioned, the securities rose in the stock markets to par, to double par, and beyond that, irrespective of how large the issues was. It was not the capitalization, but the high dividends regularly paid for a long period, that did the

Note—*Continued.*

Corporations Frauds—Regulation of Trusts and Combines.

trick; not real dividends in any honest application of that word to earnings, but trick dividends—dividends that stripped the enterprise of its power to keep up with its public duty, that let the enterprise gradually but surely run down, and that borrowed millions for dividends on the top of the depletion.

"Indeed, the whole transaction was a moral crime—a crime that robbed honest men and women of the accumulations of a life time; a crime that is not fully expiated either by arraigning before the bar of public opinion the men who got away with the plunder. I arraign as accessory before the fact the people of the great state, who, scrupulously honest in their individual dealings, issued to the projectors of this crime the ready made corporate weapon without which the crime could not have been committed."

[SUPREME COURT OF NEW BRUNSWICK.]

BEFORE TUCK, C.J. AND HANINGTON, LANDRY, BARKER, McLEOD AND GREGORY, JJ.

THE KING v. COLLINS.

Circumstantial evidence—Murder—Instruction to jury—Truth of allegations and inferences from circumstances are questions for jury alone—Misdirection as to room for doubt — New trial — Revised Cr. Code (1906) *secs.* 263, 1019.

1. On a trial for murder where the evidence is circumstantial, it is for the jury alone to pronounce on the question of the truth of the alleged circumstances deposed to, and also as to what inferences which the facts would warrant shall be drawn from the circumstantial evidence.

2. It is error and ground for a new trial for the trial Judge to instruct the jury that they cannot doubt that certain inferences are to be drawn on points material to the issue.

ARGUED: February 14, 1907.
DECIDED: February 22, 1907.

CROWN case reserved on the trial of Thomas F. *Collins* before Mr. Justice Gregory and a jury, at the last Albert *circuit, for* the murder of Miss Mary Ann McAuley. The prisoner was found guilty.

Three questions were reserved as follows for the opinion of the full Court:—

1. Did I err in not adequately directing and impressing the jury that the whole burden of proving the prisoner's guilt was upon the Crown?

2. Was there error in my assuming it proven that the prisoner had the axe in his hand, in the committing of the theft, and generally directing the jury from that standpoint?

3. Was there error in directing the jury that the desire of the prisoner to make practicable his theft and escape would be sufficient motive; and if they were satisfied the prisoner was the one who did the killing, there was no need of searching for or proving motive?

FREDERICTON, February 14, 1907.

McKeown, K.C., for the prisoner.
Jones, S.-G., and *Skinner,* K.C., for the Crown.

FREDERICTON, February 22, 1907.

TUCK, C.J.:—At the outset of the learned Judge's charge to the jury, he says: "What evidence the Crown has had to offer has been all carefully laid before you, and now your duty is, as men of intellect, as men with power of thought, with a desire to do what is right, to find the fact as it is upon the evidence that has been laid before you."

Nothing could have been fairer than that, and if it had been

left to them subsequently to find the fact, no fault could have been found with the charge.

Again he says: "Being chosen then to ascertain the facts, being chosen to hear the evidence, and from it exercise your very best judgment in determining and pronouncing what are the facts, you will see how necessary it is that you should clear your minds of all motives, of all bias, of all disposition to give effect to anything else than that which has been told to you in evidence, under the solemnity of the oath by the witnesses."

If I may be permitted to say so, this is excellent direction.

Further on the learned Judge says: "This case that we have before us is one that is to be passed upon on circumstantial evidence, but in my opinion circumstantial evidence of such a character that violent presumptions arise from the facts that are proved and about which there can be no doubt. They are not presumptions for which you have to look abroad and grope, as it were, in darkness to draw your inferences, but I think the facts that are proved will give you no great difficulty in applying your reason to them and drawing from them the natural and necessary presumptions that properly appertain."

This is pretty strong language, but not necessarily objectionable.

Looking, however, at the charge in its entirety, one may reasonably conclude that it is a powerful one on the Crown side, as to the prisoner's guilt; but, the question here under consideration is not whether or no the prisoner is guilty, but rather was he found so on a proper charge.

Of one thing there can be no possible doubt, that on the 20th of August, 1906, Mary Ann McAuley was cruelly and foully murdered. Also, there is no doubt, that the prisoner was guilty of theft; that he stole goods in Father McAuley's house on that same Monday morning, the 20th of August. The goods were seen or found on him, and it is admitted by his counsel that he stole them.

The learned Judge gives a detailed statement of what was

proved at the trial, and to my mind assumes as proved, certain matters of which there is no positive proof, but from which an inference might be drawn if properly left to the jury.

There is evidence that an axe, with a blood stain and what is said to be a mark of paint upon it, was found behind a commode in Father McAuley's room, late in December, four months after the crime had been committed. And this, after this same room had been diligently searched by Detective Killen and another, shortly after the murder. There is also evidence that the panels of closet doors had been broken in.

Here is what the learned Judge first says as to the doors and the axe:—

> "Then the doors have been produced. One use the axe has been put to, I think, has been made pretty clear. It seems to me so. It is as you may think, namely, to beat down or batter in the panels of those two doors. We then have the admission and the proved fact that this man pillaged the place and carried off his booty. Not very much, not as much as he was looking for, not as much as he would have found if he had taken time and gone further, because there was some left behind that would have been perhaps the most valuable to him of all; but we have him beating down the closet doors searching for booty, and booty he carried off, and he is confessedly a thief, and in the commission of that deed he must have had the axe in his own hand. He is the man; must be the man, I would judge. It is for you to say if you can see any other inference from it. He must be the man who was attempting, and committing the beating down of the doors in the search of whatever booty or whatever he was after. You then have him with the weapon causing death in his hands and working and using it, and that, apparently, after the blood stain got upon the axe by the dealing of the foul blow to the deceased."

This language is strong, but not as strong as what comes after. Surely this is not the proper way to leave a question of fact to a

jury. The learned Judge assumes that certain things were proved, which were not proved at all. There is no evidence by any witness that Collins had the axe in his own hand, nor that he broke down the closet doors. If in an ordinary case of larceny the facts are for the jury, how careful should a Judge be that they are left properly when a man's life is at stake? In fact, throughout the charge, the learned Judge seems to assume that the prisoner is guilty, and his strong reasoning throughout is to that effect.

After referring somewhat at length to the fact that the axe, with the blood mark on it, was not found behind the commode until the 28th or 29th of December, and saying that it was wholly immaterial when it was found, the learned Judge says:—

> "It is to the evidence you are to look for your doubts if you are to find any. Do not dishonour your intellects by imagining any doubts, unless you can point to some part of the evidence upon which they can rest. However, you can not doubt that that axe found behind the commode was the one that did the murdering, because the marks shew it. You can not doubt it is the one that broke in the doors, and you can not doubt but what the prisoner broke in the doors. The prisoner used the axe, because he comes confessedly acknowledging himself as a thief, and of the things taken out of those rooms where this breaking of doors was done."

This part of the charge is clearly all wrong. He tells the jury that they can not doubt that this was the axe that broke in the doors; that the prisoner broke in the doors, and that the prisoner used the axe. It is wrong, because, first, what the Judge asserts was not proved, and, secondly, if there was evidence from which a jury might infer guilt, the facts were not left to them.

As an illustration of the bent of the learned Judge's mind, I make some extracts from his charge, when remarking about the axe not being found till December. He says:—

> "Much time has been spent over it trying to find out about that commode and how that axe got there. The detec-

tive was made shamefaced about it that he had not found it long before; the house was locked up during the interval, and nothing in the world that you can put your finger on to throw any light upon the subject. Do not be mystified by nothing. Do not waste your time in thinking and trying to ferret out, as we have wasted our time in ferreting out that incident, which I do not know what it furnished to the learned counsel, and while it occupied our time in finding it out, we have accomplished nothing more than that something mysterious has happened in getting that axe there, or else that Mr. Killen was careless, and everyone else who looked for the axe made a very superficial search."

Once more, and this is the last extract:—

"I have shewn you the connection between the use of the axe in the murder and in the theft. I have shewn you, and the evidence shews you, that the use of the axe in the theft, was clearly, by the admission of the prisoner, in his hands."

There was no such admission and no such evidence.

Before closing, let me refer to *Regina* v. *Slavin*, 35 N.B.R. 388, where Mr. Justice Gregory himself delivers the judgment granting a new trial in a criminal case tried before Mr. Justice McLeod upon similar grounds, but not so strong as those which have governed me in arriving at a conclusion in this case. The case must go down for another trial.

HANINGTON, J. (oral):—In addition I would say this. This is a motion for a new trial on behalf of the prisoner who was convicted for the murder of Miss Mary Ann McAuley in Albert county. With the guilt or innocence of the prisoner we have nothing to do; but we have here to determine whether or not His Honour, the Judge who tried the case, left it to the jury as fully and plainly as the law requires him to do. When I say "as fully and plainly" I mean in reference to the principles which govern trials of that description.

Under the principles of our criminal jurisdiction the jurors

alone are the judges of the facts, and find whether they are true or not. They alone are from those facts, when the evidence is circumstantial, to draw their inference and conclusion, and I think it is clearly an error that a trial Judge should tell a jury not only the inference they must draw, but that there is no doubt as to any important fact or inference from that fact. The question of doubt is with them.

His Honour was quite right in telling them that they must not have a fanciful doubt, but if they had a reasonable doubt about the matter, either of the fact on which the case would turn or the inference to be drawn from any material fact proved, the prisoner was entitled to the benefit of that doubt. Instead of that His Honour (and on a long trial we can understand how it might happen) tells them with reference to one of the most material of the facts—(the most important in my judgment in relation to the crime charged, from which, if true, inferences of guilt were to be found and the conviction was to be made)—substantially that there was no doubt but that the axe found in the house was the axe that committed the murder, and the axe that broke the closet door, and no doubt the prisoner had that axe in his hand; then, following from this, would not the irresistible conclusion of that state of facts be that the prisoner had used that axe and committed the murder. Because, if he had the axe in his hand—he was the only person about there that morning, and if the evidence of the doctors was correct the murder took place in the morning—then the irresistible inference, as I have said, must be that if he had the bloody axe with which the death was caused, within an hour or about that time from when the deed was committed, that he was the murderer.

That being so, I think there is no question but that we should order a new trial so that all the facts, without any expression of opinion from the Judge, should be left to the jury to find it true or not; that from the facts as found by them they may draw such inferences and conclusions as they deem right without any declaration from the Court.

I think a new trial in this case must be ordered, though this conclusion certainly has nothing to do with the guilt or innocence of the prisoner on the evidence given.

LANDRY, J., concurred in the opinion delivered by the Chief Justice.

MCLEOD, J.:—The defendant in this case was indicted by the grand jury of Albert county for the murder of Mary Ann McAuley on or about the 20th of August, 1906. He was tried before Mr. Justice Gregory at the Circuit Court, held in Albert county in January, 1907, and found guilty. A case was reserved by the learned Judge, in which three questions were submitted for the consideration of this Court. (The learned Judge here sets out the questions reserved.)

The case, I think, must principally turn on the second question reserved. The evidence was entirely circumstantial, and, of course, it was for the jury to determine on the facts that were proved before them whether or not the prisoner was guilty, that is, it was the duty of the jury, under the direction of the learned Judge, to consider all the facts, and find as to the truth of them, and then on the conclusions to be drawn from them as to whether they sufficiently shewed that the prisoner was guilty or not.

With great deference to the learned Judge, I think, although he took a great deal of care and pains in delivering his charge, he went too far in presuming himself that certain matters were in fact proved, which were material to the case, and should have been left to the jury to determine whether or not they had been proven.

The deceased was housekeeper for one Father McAuley, and the prisoner was in his employ. Father McAuley, at the time of the murder, was absent from the house. The prisoner, probably on the day of the murder, had left the house, having stolen some goods, which goods were found on him. There was an axe subsequently found in one of the rooms of the house, on which, it was

said, there were blood stains and also marks of paint. Some of the doors leading from the room in which the axe was found had been broken open.

It was alleged, on the part of the Crown, that the murder had been committed with that axe, and that these doors had been broken open by that axe, and it was claimed that the prisoner, because he had committed the theft, was the one who had broken open these doors and had used the axe for that purpose. Nothing had been stolen from the rooms into which the doors that had been broken open led. Referring to that matter, the Judge, after speaking of the axe, and that it had blood stains upon it, proceeds as follows:—

> "Then the doors have been produced. One use the axe has been put to, I think, has been made pretty clear—it seems to me so: it is, as you may think, namely, to beat down or batter in the panels of those two doors. We have then the admission and the proved fact that this man pillaged the place and carried off his booty—not very much; not as much as he was looking for; not as much as he would have found if he had taken time and gone further, because there was some left behind that would have been, perhaps, the most valuable to him of all; but we have him beating down the closet doors searching for booty, and booty he carried off, and he is confessedly a thief, and in the commission of that deed he must have had the axe in his own hand. He is the man, must be the man, I would judge. It is for you to say, if you can see any other inference from it. He must be the man who was attempting and committing the beating down of the doors in the search of whatever booty or whatever he was after. You have him with the weapon causing death in his hands, and working and using it, and that, apparently, after the blood stain got upon the axe, by the dealing of the foul blow to the deceased."

On that, I think, the learned Judge went too far. As I have said, nothing appears to have been stolen from the rooms into

which these doors led. It was a question for the jury to ascertain whether the prisoner had the axe in his hand at all, and whether he broke in the doors.

It was improper for the learned Judge to tell the jury that the prisoner had "the weapon causing death in his hands, and working and using it." There was no direct evidence that he had it in his hand. The evidence was entirely circumstantial, and entirely for the jury. The theft, as I have already said, was not committed in any of the rooms into which the doors that were broken in led. The evidence should have been left to the jury, and it was for the jury to determine as to how far it went in proving the guilt of the prisoner. The importance of this reference to the axe by the learned Judge will more fully appear when the evidence of the finding of it is considered. With reference to that, from the evidence it appears that, on a search of the room by the deputy sheriff and Killen, the detective who was sent there to search the premises, the axe was not found. This search was shortly after the murder; but some time afterwards, and shortly before the trial, it was found in the room.

I think that was important, because if it was not in fact there at the time of the search by Killen, but was subsequently put there, it could not have been put there by the prisoner, as he was in custody all the time from within a few days after the murder. However that may be, I think the whole question should have been left to the jury as to whether there was blood upon the axe, and as to whether there was paint upon it; and also, under the facts, it would be for them to conclude whether it had been put there by the prisoner, or been used at all by the prisoner.

The learned Judge again says as follows:—

> "However, you can not doubt that the axe that got behind the commode was the one that did the murdering, because the marks shew it. You can not doubt it is the one that broke in the doors, and you can not doubt but what the prisoner broke in the doors; the prisoner used the axe, because he comes confessedly acknowledging himself as a

thief, and the things taken out of those rooms where this breaking of doors was done."

Again I say, with deference to the learned Judge, that, in my opinion, these were matters to be determined by the jury. It was for the jury to say whether under the evidence—from the marks on the axe and the other circumstances—it had been used in committing the murder. In other words, it was the duty of the jury to say whether, under all the evidence given, it was proved that the prisoner committed the murder. And it seems to me that what I have just quoted is practically a direction that he is guilty.

Reading the charge generally, the learned Judge—who, as I have said, seems to have gone over all the evidence very carefully—appears to me not to have left the evidence simply to the jury for them to come to their conclusion on, but rather to have himself drawn the conclusions from the evidence, whilst I think it is the part of the jury to say, under instructions from the Judge, what are the proper conclusions to be drawn from the evidence so given.

In other words, I think the duty of a Judge in charging the jury in cases where the evidence as to the murder arises entirely from circumstances outside (that is, from circumstantial evidence), is simply to leave all the facts to the jury, and for the jury to consider all those facts, and then determine, on the consideration of those facts, whether they are such facts on which they would find the prisoner guilty; and this, I think, was not done in this case. In my opinion there must be a new trial.

BARKER, J., agreed with MCLEOD, J.

GREGORY, J., agreed in the result.

Conviction quashed and new trial granted.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE RUSSELL, J., IN CHAMBERS.

THE KING v. ADOLPH.

Habeas corpus—Insubordination of seamen—Continuous disobedience of master's commands—Foreign seamen on British ship—Leave of Governor-General for prosecution—Canada Shipping Act, R.S.C. 1906, ch. 113, sec. 287—Revised Cr. Code, sec. 591.

1. A foreign seaman on a British ship cannot be summarily convicted for insubordination under the Canada Shipping Act, R.S.C. 1906, ch. 113, sec. 287, unless leave to lay the information has been granted by the Governor-General under sec. 591 of the Revised Criminal Code.

ARGUED: September 10, 1907.
DECIDED: September 10, 1907.

Application for the discharge under habeas corpus of Carl Adolph and Carl Johansen, two foreign seamen articled on the British ship "Hance J. Logan" (a ship registered in Nova Scotia), who had been convicted before the stipendiary magistrate for the City of Halifax under the Canada Shipping Act, R.S.C. 1906, ch. 113, sec. 287, for wilfully and continuously disobeying the lawful commands of the master of said ship.

It was objected at the trial that the magistrate had no jurisdiction inasmuch as no certificate had been obtained under section 591 of the Revised Crim. Code. The defendants were convicted and sentenced to eleven weeks' imprisonment in the county jail at Halifax.

W. J. O'Hearn, for the prisoner: Section 591 of the Criminal *Code*, 1906, has not been complied with.

RUSSELL, J.: "Does that apply to preliminary proceedings?"

O'Hearn: Yes; it was so decided in *R.* v. *Heckman* (1902), 5 Can. Crim. Cas. 542; see *Thorpe* v. *Priestnell*, [1897] 1 Q.B. 159; see also *Abraham* v. *The Queen*, 6 Can. S.C.R. 10. The affidavits shew that the applicants are not British subjects.

HALIFAX, N.S., Sept. 10, 1907.

RUSSELL, J., sustained the objection and ordered the discharge of the prisoners.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE THE HONOURABLE A. MACGILLIVRAY, COUNTY JUDGE AND EX-OFFICIO MASTER.

THE KING v. McKINNON.

Summary conviction—Fine—Imprisonment in default—Delay in issuing warrant of commitment—Canada Temperance Act, R.S.C. 1906, *ch.* 152, *secs.* 135, 151—*First offence—Ordering imprisonment on non-payment—Application of sec.* 739, *Revised Cr. Code—Cr. Code*, 1892, *sec.* 872.

1. Section 739 of the Revised Criminal Code, 1906, applies to authorize imprisonment forthwith for nonpayment of a fine imposed for a first offence under the Canada Temperance Act without the necessity of a distress, notwithstanding that the statutory form T to the latter Act giving a form of conviction for a first offence thereunder is drawn as for a distress in default of payment.

2. Form T to the Canada Temperance Act, R.S.C. 1906, ch. 152 is not to be deemed to be exclusive of all other forms of convictions for a first offence, and the effect of secs. 135 and 151 (formerly 51 Vict. ch. 34, secs. 9 and 14), is to authorize an alternative adjudication of imprisonment without distress and a corresponding form of conviction framed under the Criminal Code.

3. Upon a summary conviction imposing a fine and imprisonment in default of payment forthwith, a delay of twenty-nine days in issuing the warrant of commitment will not affect its validity.

ARGUED: October 23, 1906.
DECIDED: October 26, 1906.

ON application by counsel for the defendant, a prisoner confined in the common gaol at Port Hood in the County of Inverness, an order was granted herein on the 17th day of October, 1906, under the provisions of chapter 181, R.S.N.S. 1900, "Of securing the Liberty of the Subject," requiring the keeper of said gaol forthwith to return to me whether or not the defendant is detained in said gaol, and the cause of his detention; also requiring the convicting magistrate to return certified copies of all papers in his hands in the above cause. By the same order, Tuesday, the 23rd day of October, aforesaid, was fixed for the hearing of a motion for the discharge of the prisoner on return of said order, of which the informant and the convicting magistrate were duly notified by service of a copy of said order on each of them. The functionaries named in the order duly made returns in compliance with its terms.

It appeared by the jailer's return that the defendant is detained in prison under a warrant of commitment on a conviction (for first offence) of unlawfully selling intoxicating liquors contrary to the provisions of the second part of the Canada Temperance Act. The convicting magistrate returned copies of the information, summons, minutes of evidence taken at the trial, minutes of conviction and convictions.

On the hearing, counsel for the prisoner took the following grounds:—

(1) That there were errors or irregularities in the proceedings at the trial.

(2) That the prisoner was arrested when in attendance as witness on his own behalf at the trial of a charge also of violating the second part of the said Canada Temperance Act and on which charge he was acquitted.

(3) That the conviction herein which adjudges pecuniary penalty and for non-payment thereof forthwith imprison-

ment is defective because it does not follow the form prescribed by the Acts of 1888, ch. 34, amending ch. 106, R.S.C., which form requires an adjudication for distress by warrant of the goods of the defendant in default of payment of the fine imposed, before a warrant of commitment issue.

ANTIGONISH, N.S., October 26, 1906.

MACGILLIVRAY, Co. J.:—After reading the minutes of the proceedings at the trial in the Court below, I do not think the allegations contained in the affidavits of the defendant and of his counsel at said trial sufficiently establish that iregularities occurred at the trial as claimed on the first ground taken. Although errors and irregularities in proceedings might be entertained on applications of this nature, yet I am of the opinion they should be of a very glaring character, and that the remedy by appeal would not be available to the defendant, particularly when the jurisdiction of the Court below is not called in question.

The facts in support of the second ground are not of sufficient force to justify me in entertaining the point raised by this ground; and indeed counsel for the prisoner did not press it in his argument at the hearing.

In dealing with the third ground the question arises: Had the convicting magistrate jurisdiction to make the conviction herein? If he had not, the defendant is illegally imprisoned and unlawfully detained in gaol under the warrant issued on said conviction. If on the other hand he had jurisdiction to make such conviction the prisoner is lawfully detained in custody under such warrant.

The adjudication in the conviction herein is as follows:—

"And I adjudge the said John G. McKinnon for said offence to forfeit and pay the sum of fifty dollars to be paid and applied according to law and also to pay to the said John D. McLellan the sum of seventeen dollars and twenty cents for his costs in this behalf; and if the said several sums

are not paid forthwith I adjudge the said John G. McKinnon to be imprisoned in the common gaol at the said County of Inverness and there kept for the term of three months unless the said several sums and all costs and charges of conveying the said John G. McKinnon to the said common gaol shall be sooner paid."

In support of the proposition that the convicting magistrate had no jurisdiction to make the conviction herein, the prisoner's counsel relies on the decision in *The Queen* v. *McFarlane*, 24 N.S.R. 54, followed in *The Queen* v. *Ferguson*, 26 N.S.R. 154. The application in that case was for a writ of certiorari to remove a conviction in respect to an offence under the Canada Temperance Act. The alleged defect was that it did not follow the form in the schedule to the said amendment to that Act, passed in 1888. The majority of the Court (Ritchie, J., dissenting) decided in favour of the contention of the applicant. Graham, E.J., delivering the judgment of the Court, quotes the amendment referred to, viz., section 14, chapter 34, Act 1888, which reads as follows:—

"The forms given in the schedule to this Act, or any forms to the like effect, shall be sufficient in the cases thereby respectively provided for: and where no forms are prescribed by the said schedule new ones may be framed in accordance with the "*Canada Temperance Act*" or with "*The Summary Convictions Act.*"

Commenting on this amendment the learned Judge says:—

"A provision is therefore made by the Canada Temperance Act in respect to this matter, viz., the forms of conviction. An offence is therefore no longer to be "prosecuted in the manner directed by the Summary Conviction Act" so far as forms of conviction are concerned. I think that the principles of construction of statutes would require one to hold that there are not two statutory forms of convictions provided by one and the same Act of Parliament for the one offence."

In view of the provisions of the Summary Convictions Act, so far as no provision is made by the Canada Temperance Act for any matter or thing which is required to be done with respect to prosecutions thereunder, being made applicable to such prosecutions, I am constrained to differ from the conclusions arrived at by the Court in the above cited case, and agree with the dissentient opinion of His Lordship, Mr. Justice Ritchie.

Section 107 of the Canada Temperance Act makes the provisions of the Summary Convictions Act (Part lviii. of the Criminal Code, 1892) applicable so far as no provisions are thereby made, to prosecutions under the said Canada Temperance Act. The section as amended by the Acts of 1888, ch. 34, sec. 9, reads:

> "Every offence against the second part of this Act may be prosecuted and the penalties and imprisonments therefor enforced in the manner directed by the Act respecting summary proceedings before justices of the peace, so far as no provision is hereby made for any matter or thing which is required to be done with respect to such prosecution; and all provisions contained in the said Act shall be applicable to such prosecutions and to the judicial and other officers before whom the same are hereby authorized to be brought in the same maner as if they were incorporated in this Act, and as if all judicial and other officers were named in the same Act."

By the terms of the above quoted section the provisions of the Summary Convictions Act, so far as no provisions are thereby made, are incorporated into the Canada Temperance Act for the purpose of applying to practice the substantive law enacted thereby. The procedure provided for in the Act itself embraces only:—

(*a*) By whom penalties may be sued for.

(*b*) Before what tribunals proceedings may be brought.

(*c*) Limitation of prosecution under the Act.

(*d*) Granting of warrants to search for liquors and to destroy liquors seized under such warrants.

(*e*) Necessary allegations in describing offences.

(*f*) Proof of sale and of previous convictions.

(*g*) Variance and defects in informations, convictions and warrants; and amendments thereof.

(*h*) Restriction of certiorari and appeals from convictions.

It is apparent that within the compass of the provisions as to procedure made by the Canada Temperance Act, there is none respecting convictions.

We must, therefore, look to the provisions in this respect as provided by the Summary Convictions Act. Section 872, Part lviii. of the Criminal Code makes the necessary provisions in respect to convictions. The section as amended by chapter 57, Acts 1894, reads:—

> "Whenever a conviction adjudges a pecuniary penalty or compensation to be paid or an order requires the payment of a sum of money whether the Act or law authorizing such conviction or order, does or does not provide a mode of raising or levying the penalty, compensation or sum of money, or of enforcing the payment thereof, the justice by his conviction or order after adjudging payment of such penalty, compensation or sum of money, with or without costs, may order and adjudge—
>
> "(*a*) That in default of payment thereof forthwith, or within a limited time, such penalty, compensation or sum of money shall be levied by distress and sale of the goods and chattels of the defendant, and if sufficient distress cannot be found, that the defendant be imprisoned in the common gaol or other prison of the territorial division for which the justice is then acting, in the manner and for the time directed by the Act or law authorizing such conviction or order or by this Act, or for any period not exceeding three months, if the Act or law authorizing the conviction or order does not specify imprisonment, or does not specify any term of imprisonment, unless such penalty, compensation or sum of money,

and costs if the conviction or order is made with costs, and the expenses of the distress and conveying of the defendant to gaol, are sooner paid; or—

"(*b*) That in default of payment of the said penalty, compensation or sum of money, and costs, if any, forthwith or within a limited time the defendant be imprisoned in the manner and for the time mentioned in said Act or law, or any other period not exceeding three months, if the Act or law authorizing the conviction or order does not specify imprisonment or does not specify any term of imprisonment unless the said sum with the like costs and expenses are sooner paid."

There can be no doubt that the convicting magistrate, in this case had jurisdiction under the provisions of the above quoted section, after adjudging in the conviction that the defendant forfeit and pay the sum of $50 penalty and $17 costs, to order and adjudge—

(*a*) That in default of payment thereof forthwith such penalty should be levied by distress and sale of goods and chattels of the defendant, and if sufficient distress could not be found that the defendant be imprisoned for the term of three months; or (unless limited by form T, in schedule to said chapter 34 of the Acts of 1888" Form of conviction for first offence")—

(*b*) That in default of payment of said penalty and costs forthwith the defendant be imprisoned for the term of three months, unless the said sums with like costs and expenses were sooner paid.

The question now to be decided is:—

Does the "form of conviction for first offence" given in the schedule to the amendments of 1888 to the Canada Temperance Act, taken in conjunction with section 14 of the amending Act, which prescribes such form, repeal paragraph lettered (*b*) of subsection 1, of section 872 of the Criminal Code so far as procedure for offences under the second part of the said Canada Temperance Act is provided?

I am of the opinion it does not. The amendment does not in express terms repeal said paragraph lettered (*b*); nor does it do so by implication as the Court decided in the case of *The Queen* v. *McFarlane*, 24 N.S.R. 54. As already stated paragraph lettered (*b*) is a part of the provisions respecting convictions as well as paragraph lettered (*a*) of said section 872. The "form of conviction for first offence" corresponds with the provisions of paragraph lettered (*a*).

Because it does not correspond with the provisions of the paragraph lettered (*b*), it does not follow that it repeals the latter paragraph. One of the cardinal rules of construction of statutes when the enacting part and the schedule cannot be made to correspond, is laid down by Lord Denman, C.J., in *The Queen* v. *Baines* (1840), 12 Ad. & El. 210, at page 227:—

> "We have also to consider the language of the section itself to which the schedule is appended; and if there be any contradiction between the two, which upon fair construction there perhaps will not be found to be, upon ordinary principles, the form, which is made to suit rather the generality of cases than all the cases, must give way."

Upon fair construction of said section 872 of the Code, it will be found that the form prescribed by the amending Act of 1888 corresponds with the provisions of said paragraph lettered (*a*) and adjudication under section 875 of the Criminal Code; and that form WW, "Conviction for penalty and in default of payment imprisonment," provided by the Summary Convictions Act, corresponds with said paragraph lettered (*b*).

There are not "two statutory forms of convictions prescribed by one and the same Act of Parliament for the one offence," as decided in *The Queen* v. *McFarlane*, 24 N.S.R. 54.

Form T, in the schedule to the amending Act of 1888 is the same as form VV in the schedule to Part lviii of the Code (the Summary Convictions Act), and corresponds with that provision respecting conviction which orders distress before imprisonment; but the form contains too much to correspond with the

alternative provision which orders imprisonment in default of payment without ordering distress.

I think the construction to be put on section 14 of the amending Act of 1888 would justify the framing of a new form in accordance with the provisions of said paragraph lettered (*b*). even were no forms provided in the schedule to said Part lviii, corresponding with its provisions, rather than it be held that it repeals said paragraph.

In *Ex parte Casson* (N.B.), 2 Can. Cr. Cas. 483, it was decided that a conviction under the Canada Temperance Act may, by virtue of section 872 (*b*) of the Criminal Code, direct imprisonment in default of payment of fine and costs without award of distress upon the defendant's goods.

In *The Queen* v. *McDonald,* 26 N.S.R. 94, the Court did not follow, but virtually departed from the conclusion it had arrived at two years before in *The Queen* v. *McFarlane.*

I have therefore less reluctance in coming to the conclusion in the face of the decision in *McFarlane's Case,* that the conviction attacked on this motion is valid and in accordance with the procedure applying to summary convictions under the Canada Temperance Act.

Counsel for the prisoner raised the question as to whether or not the convicting magistrate possessed the power of suspending sentence by allowing time to elapse between issuing the warrant of commitment and the date of the conviction. The conviction was made on the 11th day of May, and the warrant of commitment was issued on the 9th day of June, 1906. This question was suggested by a doubt on this point expressed by Hodgson, M.R., in *Re Thomas Lynch,* 12 Can. Cr. Cas. 141. The commitment in execution of the conviction is quite distinct from the adjudication in the conviction. The latter is a judical act, the former is a ministerial one,—being the authority to constables and jailers to take and hold the offender, that the sentence of the Court may be enforced.

I am of opinion that the warrant of commitment herein was properly issued twenty-nine days after the date of the conviction. The application for the discharge of the prisoner under the warrant of commitment herein is refused.

Discharge refused.

E. Lavin Girroir, for prisoner.
J. A. H. Cameron, for informant.

[COURT OF APPEAL FOR ONTARIO.]

BEFORE MOSS, C.J.O., AND OSLER, GARROW, MACLAREN AND MEREDITH, JJ.A.

THE KING v. HAYS.

Wilful disobedience of statute—Corporation—Non-feasance—Prosecution of railway company's manager in charge of its operations—Failure to prove active participation of officer in bringing about the company's default—Cr. Code 1892, *sec.* 138—*Revised Cr. Code* 1906, *sec.* 164.

1. The manager of a corporation is not criminally liable as for wilful disobedience of a statute under Revised Cr. Code sec. 164 (former sec. 138) in respect of the corporation's neglect not due to any active participation on his part, to perform a statutory duty imposed upon it.

ARGUED: January 31, 1907.
DECIDED: March 14, 1907.

SPECIAL case reserved by the police magistrate of the city of Toronto.

TORONTO, January 31, 1907.

Wallace Nesbitt, K.C., and *A. M. Stewart*, for the defendant. The conviction is under sec. 138 of the Code for an offence against sec. 3 of 16 Vict. ch. 37, but there is a new mode of punishment now provided by sec. 294 of the Railway Act of 1903, 3 Edw. VII. ch. 58 (D.). The defendant is convicted, but the magistrate's findings were that the company was guilty: *The Queen* v. *Tyler*, [1891] 2 Q.B. 588, at p. 592, *per* Bowen, L.J. The magistrate has no jurisdiction; the defendant lives in Montreal, and the offence, if any, was committed on the line of railway between Toronto and Port Hope. There was no disobedience of an Act of the Parliament of Canada or any Legislature in Canada, as 16 Vict. ch. 37 was an Act of the old Province of Canada. Section 3, sub-sec. (*a*) of the Code excludes that. The defendant has not wilfully committed any offence: *Re E. J. Parke* (1899), 3 Can. Crim. Cas. 122, 30 O.R. 498; *Johnson* v. *Allen* (1895), 26 O.R. 350.

J. W. Curry, K.C., for the complainant, *contra*. There was a duty imposed upon the railway; the defendant is its head, and the only official head in Canada. The statute imposing the duty is still in force, 16 Vict. ch. 37, sec. 3; the defendant is liable, and properly convicted under sec. 138, Criminal Code, 1892. Sub-sec. (*a*) of sec. 3 of the Criminal Code includes Acts of the Parliament of the old Province of Canada. The defendant, being in control of the railway and the only one in control, in Canada, is personally responsible.

Nesbitt, in reply, cited *The Grand Trunk R.W. Co.* v. *Perrault* (1905), 36 S.C.R. 671.

TORONTO, March 14, 1907.

OSLER, J.A.:—This conviction is open to a great many objections, most of which I should say are fatal to it, but only one or two of the most obvious need be noticed.

The defendant is second vice-president and general manager of the Grand Trunk Railway Company of Canada. He has been summarily tried under Part LV. of the Criminal Code for an offence against sec. 3 of 16 Vict. ch. 37, 1852, an Act to incorporate the

Grand Trunk Railway Company, and sec. 138 of the Criminal Code, which enacts, that, every one is guilty of an indictable offence and liable to one year's imprisonment who, without lawful excuse, disobeys any Act of the Parliament of Canada or of any Legislature in Canada by wilfully doing any act which it forbids, or omitting to do any act which it requires to be done, unless some penalty or other mode of punishment is expressly provided by law.

Section 3 of the Railway Act referred to enacts, that "the fare or charge for each third-class passenger by any train on the said railway, shall not exceed one penny currency for each mile travelled, and that at least one train having in it third-class carriages shall run every day throughout the length of the line."

The complaint is, that the defendant—not the company—has disobeyed this section, by omitting to do that which the section requires to be done. The magistrate finds, that the company has not at any time during the year 1906 fixed upon a tariff of charges or fares payable by each third-class passenger by any train on said railway for each mile travelled; that the company has not during that time permitted a third-class passenger to travel by any train on said railway at the fare or charge of one penny currency for each mile travelled; and further, that the said company has not, during that time, provided that at least one train having in it third-class carriages shall run each day from Kingston to Toronto, "being part of the said railway."

Upon these findings the magistrate proceeded to convict the defendant Charles M. Hays—though no formal conviction seems to have been drawn up—of the offence charged, and the conviction having been questioned on the ground that it was without jurisdiction and was erroneous in point of law, the learned magistrate submitted the question to this Court, whether, upon the facts so found, the conviction was right.

Upon the mere statement of the case the answer must be that the conviction is wrong.

1. The charge is that Hays committed the offence, while the findings are that the company did so. In the absence of some

clear statutory enactment the defendant cannot be punished for the default of his company.

2. There is no authority to prosecute the defendant under sec. 138. The obligation, if there be one, is the company's obligation, and the company, and not their official, however important and commanding the position which he occupies, is the only one to be prosecuted, if a prosecution will lie for its breach, so far as sec. 138 of the Code can be invoked for that purpose. That a corporation could not under that section be punished by imprisonment would not warrant the prosecution of one of its servants.

Quaere: Whether the latter part of sec. 958 of the Code could be applied if the corporation itself had been prosecuted?

3. Section 138 cannot apply under any circumstances, inasmuch as sec. 294 of the recent Railway Act, 3 Edw. VII. ch. 58 (D.), now enacts that "The company, or any director or officer thereof, ... doing, causing, or permitting to be done, any matter, act or thing contrary to the provisions of this or the special Act, . . . if no other penalty is, in this or the special Act, provided for such act or omission, is liable for each offence, to a penalty of not less than twenty dollars, and not more than five thousand dollars, in the discretion of the Court," etc.

I do not suggest that a prosecution would lie under this section for the particular omission complained of against an official of the company. Doubtless some acts or omissions may be those of the individual servants of the company, but others can be properly attributed only to the company or corporation itself. It is enough to say here, that sec. 294 deprives sec. 138 of the Criminal Code of its application.

I think we ought not on this appeal to deal with the question whether sec. 3 of the Act of 1852 has been impliedly repealed by the Railway Act of 1903. That is a question which can be more conveniently heard and disposed of by proceedings taken before the Railway Commission, whose decision in that respect can be reviewed by the Supreme Court.

Moss, C.J.O., and GARROW, J.A., concurred in the judgment of OSLER, J.A.

MACLAREN, J.A.:—The defendant, who is the second vice-president and general manager of the Grand Trunk Railway, was accused under sec. 138 of the Criminal Code, 1892, before the police magistrate for the city of Toronto, of having without lawful excuse disobeyed sec. 3 of ch. 37 of 16 Vict. of the Province of Canada, by omitting to do what that section requires to be done, *viz.*, to carry third-class passengers for the fare of one penny for each mile travelled, and to provide, that at least one train having in it third-class carriages shall run every day throughout the length of the line.

The defendant on December 1st, 1906, subject to his objections, consented to be tried summarily and pleaded not guilty.

After hearing the evidence the magistrate made the following findings: (1) That the Grand Trunk Railway Company has not at any time during 1906 fixed or issued a tariff of fares, payable by each third-class passenger by any train on said railway for each mile travelled; (2) that it has not during that time permitted a third-class passenger to travel by any train on said railway, at the fare of one penny currency for each mile travelled; (3) that it has not during that time provided that at least one train having in it third-class carriages shall run each day to Kingston from Toronto, being part of said railway.

He thereupon found the defendant guilty of the offence charged, and the conviction having been questioned on the ground that it was without jurisdiction and was erroneous in point of law, he reserved for this Court the question whether upon the facts so found the conviction was right.

The above statute, 16 Vict. ch. 37, of the old Province of Canada, incorporated the Grand Trunk Railway Company and authorized it to construct a railway from Toronto to Montreal. Section 3 provides that "The fare or charge for each first-class passenger by any train on the said railway, shall not exceed two pence currency for each mile travelled: the fare or charge for each second-class passenger . . ., shall not exceed one penny and one-half penny currency for each mile travelled: and the fare or charge for each third-class passenger . . ., shall not exceed one penny currency for each mile travelled: and that at least one train having in it

third-class carriages shall run every day throughout the length of the line."

Section 138 of the Criminal Code, under which the charge was laid, reads as follows:—"Every one is guilty of an indictable offence and liable to one year's imprisonment who, without lawful excuse, disobeys any Act of the Parliament of Canada, or of any Legislature in Canada, by wilfully doing any act which it forbids, or omitting to do any act which it requires to be done, unless some penalty or other mode of punishment is expressly provided by law."

Against the validity of the conviction the following grounds were urged before us: (1) That if there could be a conviction under these Acts it was of the company and not of Mr. Hays, and the company alone could be punished; (2) that there was no *mens rea*; (3) that the defendant was a resident of Montreal and the magistrate had no jurisdiction; (4) that there was no disobedience of any Act of the Parliament of Canada or of any Legislature in Canada; (5) that if there was an offence, sec. 294 of the Railway Act of 1903 fixed the penalty, *viz.*, from $20 to $5,000, and sec. 138 of the Code did not apply; (6) that sec. 3 of 16 Vict. ch. 37, above quoted, was repealed by 46 Vict. ch. 24, sec. 12 (D.); and by sec. 251 of the Act of 1903 all tolls are to be fixed by the company or the directors subject to the approval of the Board of Railway Commissioners, which has been done in the present case.

As to the first of these objections, no doubt the law formerly was that officers and directors might be punished for the offences of their companies or corporations. The authority quoted for this was a dictum of Lord Holt reported in 12 Mod. 559, where he said: "A corporation is not indictable, but the particular members of it are." The latest case in which this was followed of which I am aware was in 1834, *Rex* v. *Medley*, 6 C. & P. 292. In that case the directors of an incorporated gas company were indicted and convicted of a nuisance committed by the servants of the company without their knowledge and contrary to their directions.

This rule is said to have been followed, partly because imprisonment, the punishment prescribed for many offences, was inapplicable to corporations, and partly because the fact of a corporation being

an entity distinct from the individual corporators was formerly not kept so clearly in mind as at present, but largely on account of the practical difficulties in prosecuting corporations. At the assizes and the sessions it was necessary that the accused should appear in person; they could not appear by attorney. As corporations could not comply with this rule, the indictment had to be removed by *certiorari* to the King's Bench, where the accused could appear by attorney. See *Regina* v. *The Birmingham and Gloucester R.W. Co.* (1840), 9 C. & P. 469, and *ibid.* 3 Q.B. 223.

In England it is still the law that a corporation cannot be prosecuted at the sessions: Archbold's Criminal Pleading, 23rd ed., p. 11.

In this country the Dominion Act of 1883, 46 Vict. ch. 24, removed all difficulties as to the prosecution of corporations by laying down a special procedure, and providing that a corporation might appear by attorney in any court in which an indictment was found, and that it should no longer be necessary to remove the indictment into a superior court to compel the corporation to plead to it. These provisions now form secs. 916 to 920 of the Criminal Code in R.S.C. 1906.

It had long been held that an indictment would lie against a corporation for non-feasance. That it would also lie for misfeasance was laid down by Denman, C.J., in *The Queen* v. *The Great North of England R.W. Co.* (1846), 9 Q.B. 315. This has been cited and favourably commented upon in many subsequent cases, among them *Whitfield* v. *The South Eastern Ry. Co.* (1858), E.B. & E. 115; *The Pharmaceutical Society of Great Britain* v. *The London and Provincial Supply Association, Ltd.* (1879), 4 Q.B.D. 313; *The Queen* v. *Tyler*, [1891] 2 Q.B. 588; and *The Union Colliery Co.* v. *Her Majesty the Queen* (1900), 31 S.C.R. 81.

It is now well settled law that a corporation may be prosecuted for crimes not only of omission but also of commission, except such as from their nature cannot be committed by a corporation, such as treason, murder, perjury and the like; and also except as to those crimes for which imprisonment or corporal punishment is the only penalty provided. Thus a corporation cannot be indicted for manslaughter, as the punishment may be imprisonment for life: Criminal

Code, sec. 236; and a fine cannot be substituted: Criminal Code, sec. 958; *Regina* v. *Great West Laundry Co.* (1900), 13 Man. L.R. 66.

I think that "everyone," in sec. 138 of the Code, is within sec. 3 (*t*), the interpretation clause of the Code, which says that the expressions "person," "owner," and other expressions of the same kind, include His Majesty and all public bodies, bodies corporate, etc.

The maximum penalty for the violation of sec. 138 is one year's imprisonment, so that by sec. 958 of the Code a fine may be imposed in lieu thereof.

It would appear, therefore, that if the company has been guilty of a breach of these statutes there is no obstacle in the way of its prosecution and punishment, especially as the alleged offence is one of non-feasance or omission, and one for which a corporation could have been prosecuted even under the older law.

I am not aware of any case, either in England or in this country, within the last seventy years, where an officer or director of a company has been held liable for an offence committed by the company, except as an aider, abettor, or accessory, nor am I aware of any provision of our law under which this could be done, except when he has actually aided or abetted in the commission of the offence, or counselled or procured its commission.

Such is also the law in the United States: see Thompson on Corporations, par. 4114, and *People* v. *Clark* (1891), 14 N.Y. Supp. 642. It is there laid down that where the offence of the corporation is misfeasance, all officers or other person participating in the violation of the law are guilty; where the offence is non-feasance, it is an offence only of the corporation or party upon whom the duty is imposed by the statute.

As the Act of 1852 imposes the duty of running these third-class carriages and carrying third-class passengers for a penny a mile upon the Grand Trunk Railway Company alone, the defendant can only be held liable, if at all, under part of the latter sec. 61 of the Code (now sec. 69 of the Code in R.S.C. 1906, ch. 146), which reads as follows: "Everyone is a party to and guilty of an offence who (*a*) actually commits it; or, (*b*) does or omits an act for the purpose of aiding any person to commit the offence; or, (*c*) abets

any person in commission of the offence; or, (*d*) counsels or procures any person to commit the offence."

There is no offence, either on the part of the company or of the defendant, in running the trains which they now operate; they can lawfully run a hundred or more passenger trains such as they run now; the offence charged is in not running one train a day with third-class carriages. The offence charged is a pure case of non-feasance.

In order to make out a case against the defendant, it was necessary for the prosecution to shew that he aided or abetted the commission of the offence or counselled or procured it. So far is this from being the case, that each of the three findings of the police magistrate is against the company and against the company alone; the defendant is not even mentioned or alluded to in a single one of them. The complainant does not even refer to him in his examination in chief, and all he says in cross-examination is: "Defendant lives in Montreal I believe, and is general manager and second vice-president of the Grand Trunk Railway."

All that the only other witness says about him is: "Defendant is resident of Montreal. He is in charge of the operation of the line in Canada and acts under the board of directors who reside in England. He is the responsible head in Canada I should say. He is occasionally in the city of Toronto in reference to railway business, I have no doubt."

This evidence falls far short of making him out either a principal, or an aider, abettor or accessory, in the offence charged, if offence there be.

The authorities go to shew that in order to hold the defendant liable under such provisions as those in the statutes above cited, active participation in the commission of the offence must be proved against him. Mere acquiescence is not sufficient: *Rex* v. *Hendrie* (1905), 10 Can. Crim. Cas. 298, 11 O.L.R. 202. For aught that appears in this case, it may be that the defendant may be personally in favour of the company running third-class carriages, for a fare of a penny a mile, and may even have tried to induce the board to do so.

This point being conclusive of the present case, it becomes unnecessary to consider the other objections to the conviction.

The question reserved for us by the police magistrate should be answered in the negative.

MEREDITH, J.A.:—This case presents upon its face these extraordinary and illogical features: the company, and the company only, have been found guilty: and yet the individual, and the individual only, has been convicted. There is no power to make a criminal of one for the offences of another.

If the company have committed a crime, the company should be prosecuted, and, on due proof of it, be convicted and punished. If the defendant be guilty, his guilt must be proved, and found, before conviction. There is no excuse for his conviction for an offence found to have been committed by the company only. A servant is not answerable for the crimes of his master; he is answerable only for those to which he is proved to have been a party. It is not needful to say what would have been the result if the police magistrate's finding had been that the defendant had done those things which he found that the company only had done. Nor does it seem to me to be proper to consider some of the other formidable objections to this conviction in the absence of the company who are mainly interested in them.

The conviction is clearly bad.

Conviction quashed.

Note: *Criminal responsibility of corporation managers.*

As was said by Garrow, J., in *The King* v. *Central Supply Association*, ante, page 371, there are offences, such as assaults, which it is physically impossible for a corporation to commit, but for such offences as they can commit, whether of misfeasance or malfeasance, and for which the prescribed punishment is one which they can be made to endure, they are as amenable to the criminal law as are natural persons: see *The Queen* v. *The Great North of England R.W. Co.* (1846), 9 Q.B. 315; *The Queen* v. *Tyler and International Commercial Co.*, [1891] 2

Note—*Continued.*

Criminal responsibility of corporation managers.

Q.B. 588-594; *Pharmaceutical Soc'y* v. *London and Provincial Supply Association* (1880), 5 App. Cas. 857.

Some one or more officers of the corporation may also be liable upon a criminal charge arising out of the same occurrence in respect of the officer's personal misfeasance or malfeasance.

In a recent case, *Rex* v. *Michigan Central Ry.* (not yet reported), in which the railway company had been indicted for a nuisance under the Revised Cr. Code sec. 221, in carrying dynamite without proper precautions whereby fatalities resulted and for criminal neglect under sec. 247 whereby human life was endangered, Mr. Justice Riddell said in delivering judgment after a plea of guilty:

> "If it were the fact that the board of directors or the general manager of the defendants' company, or anyone responsible, directly or indirectly, for the system carried on in the transportation of explosives, resided within the jurisdiction of this Court, I should have recommended their being indicted as well as the company. It is right and just that employees of whatever grade shall be placed upon trial when any negligence of theirs caused wounds or death, and the higher officers through whom a defective system is put or kept in operation should not escape."

In *Ex parte Brydges* (1874), 18 Lower Canada Jurist 141, the application was upon the return of rules *nisi* to quash a coroner's inquisition (which then had an effect similar to an indictment) and for the discharge of Mr. Brydges' recognizance, under the following circumstances:—A man named Cauchon had been killed by a G.T.R. train at a level crossing. Mr. Brydges was the managing director of the railway and on complaints made that the crossing was particularly dangerous, had admitted the fact and promised the Attorney-General that he would have a watchman placed there. He did not place a watchman as promised and the fatality to Cauchon resulted.

The finding of the coroner's jury was quashed because it was insufficient in form and did not sufficiently charge a criminal

Note—*Continued.*

Criminal responsibility of corporation managers.

offence. Sanborn, J., said that while Brydges promised what the law did not compel him to perform, he could not be indicted for failing to fulfil the promise, but he could not be fully exonerated from blame. He also said (page 145):—

> "It is proper to observe that any person, whether a manager, agent, or holding no official relation to the railway, may be guilty of manslaughter, not merely for violation of law, or disobedience to rules established by the company according to law, but even in doing what is in itself legal, if the act or acts are done with malice or gross negligence whereby a life is lost. The act or gross negligence must have some direct agency with the death. I may conceive it possible that a case might occur in which the manager of a company might cause the company's trains to be run or controlled under circumstances where human life is put in hazard so recklessly and with so little regard for the safety of individuals as to expose himself to indictment for manslaughter in case of loss of life being occasioned by literal obedience to his orders."

Mr. Justice Ramsay said in the same case (page 143):—

> "I do not wish, however, to be understood to say that I think a servant of a railway company cannot be held liable for an error of omission as well as for an error of commission. It will not be questioned that an engine driver may be indicted for manslaughter if he causes the death of any one by omitting to take any of the usual precautions in driving his engine. A case of this kind actually occurred in 1868. It went to the petty jury and the prisoner was acquitted on the facts. His legal responsibility was not doubted. If an engine driver can thus become liable for an omission, I cannot see why a managing director should not become liable also if he omits to do what the law imposes and what he undertakes to see done. Of course the scope of his functions is a matter of fact to be considered; but names have a meaning, and 'managing director' may signify a good deal."

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE SIR R. L. WEATHERBE, C.J., TOWNSHEND, J., GRAHAM, E.J. AND MEAGHER AND RUSSELL, JJ.

THE KING v. McKENZIE.

Summary conviction—Excessive term of imprisonment imposed—Certiorari—Power of Court to amend—Cr. Code 1892, *secs.* 883, 889—*Revised Cr. Code* 1906, *secs.* 754, 1124.

1. Where upon the return to a writ of certiorari the Court, upon perusal of the depositions, has no doubt as to the commission of the offence for which the defendant has been tried and convicted, but the conviction is defective in awarding a longer term of imprisonment than the statute permits, the court has power to amend the conviction by reducing the term to the statutory limit.
2. The merits of the defence as disclosed by the depositions may be enquired into upon the motion to amend, but the reference in Revised Code sec. 1124 dealing with certiorari matters to the procedure on appeals from summary convictions does not imply that there shall be a trial *de novo* for the purpose of fixing an appropriate punishment.

ARGUED: November 27, 1906.
DECIDED: January 17, 1907.

Motion to set aside a conviction made the 6th day of December, A.D. 1905, at North Sydney, in the County of Cape Breton, whereby the defendant, Malcolm McKenzie, of Mira, in the County of Cape Breton, yeoman, was convicted before A. R. Forbes and James Desmond, two of His Majesty's Justices of the Peace in and for the said county, "for that he, the said Malcolm McKenzie, did, on or about the 25th day of December, A.D. 1904, at Mira Gut, in the County of Cape Breton, wrongfully and unlawfully and knowingly harbor goods unlawfully imported into Canada, and did thereby violate the provisions of section 197 of the Customs Act of

Canada, being chapter 32, Revised Statutes of Canada, as amended by the Customs Amendment Act, 1888, section 38."

For this offence defendant was adjudged "to forfeit and pay the sum of fifty dollars, to be paid and applied according to law, and also to pay John C. Bourinot, the informant herein, the sum of $18.20 for his costs in this behalf; and if the said several sums are not forthwith paid, to be imprisoned in the common jail for the said County of Cape Breton, at Sydney, in the said County of Cape Breton, for the term of six months, unless the said sums, and the costs and charges of conveying the said Malcolm McKenzie to the said common jail, are sooner paid."

The conviction was brought up by certiorari, and the Court was moved to quash the same upon the following grounds:

1. Because the said conviction is bad on its face, in that it imposes excessive imprisonment in default of payment of the fine and costs.

2. The said conviction is bad wherein it adjudges a penalty of $50 for the offence therein alleged, and costs of $18.20, and, in default of payment, six months imprisonment in the common jail for the County of Cape Breton.

3. The said conviction is ambiguous and uncertain in not stating with sufficient certainty what penalty is inflicted, or intended to be inflicted, and for imposing a penalty unauthorized by law.

4. Because the said justices had no jurisdiction to make said conviction.

HALIFAX, Nov. 27, 1906.

J. J. Ritchie, K.C., in support of motion: There is no power to imprison for 60 days in default of payment. *The Queen* v. *Gavin* (1897), 1 Can. Cr. Cas. 59, 30 N.S.R. 62; *The Queen* v. *McIvor,* 7 Can. Cr. Cas. 183; *The Queen* v. *McKenzie,* 6 O.R. 165.

W. F. O'Connor, contra: This Court has power to look at all the evidence, and decide this case as the Judge below should have decided it. *The Queen* v. *Spooner*, 4 Can. Cr. Cas. 209, at p. 215; *The Queen* v. *Murdock*, 4 Can. Cr. Cas. p. 82. *Reg.* v. *Horton* (1897), 3 Can. Cr. Cas. 84, 31 N.S.R. p. 217; *Rex.* v. *Hines*, 7 E. & B. 357; *Reg.* v. *Crandall*, 27 O.R. 63.

J. J. Ritchie, K.C., in reply. The amendment should not be made at all.

HALIFAX, January 17, 1907.

Sir R. L. WEATHERBE, C.J. (dissenting):—It was admitted, when the case was called, by the prosecutor, that he could not sustain the conviction, on the ground that it was bad by reason of the punishment in excess of the statute, but an amendment was asked for by plaintiff to have the excess struck off. The method by which a remedy is provided is to be found in section 889 of the Code. [Cr. Code of 1892.]

We heard argument as to whether the amendment asked for could be made, but we reserved that with other questions. No amendment can be made.

If we had looked at the depositions for the purpose of satisfying ourselves whether an offence had been committed, and decided that point, we might, upon that decision, have heard and determined the charge upon the merits, practically all at the same time, as in the Ontario cases. We were not asked to do so. The depositions were not even read to us. Upon reading those depositions since, I, for one, became satisfied that there was an offence committed.

I do not understand, in such a case as this, where an amendment is asked for, and we are not directly or indirectly asked to hear the case upon the merits, that we are complying with the spirit or letter of the statute by turning ourselves into a Court of Appeal before having considered whether any offence had been committed, and reviewing the depositions to see what sort of decision we should make behind the backs of counsel.

I have little doubt that defendant's counsel might not have desired to further address us in the present case. It may be so. They suddenly found themselves successful, owing to plaintiff's abandonment of the illegal conviction. They were then required to oppose the motion that was made for amendment.

If, satisfying ourselves of the committal of an offence by reading the depositions, we had then conferred and announced that decision, or if in any way we had suggested, directly or indirectly, that no order could be made for amendment; or, if we had offered to treat the parties as if the matter had come up on appeal, the statute would have permitted them to be heard fully upon the merits.

But we never heard the depositions, never satisfied ourselves, as we might have done, whether an offence had been committed—and never agreed, or announced whether we considered ourselves a Court of Appeal.

It was not till after the argument was over that we satisfied ourselves, and found that we were agreed there was an offence committed, upon the perusal of the depositions. I was not aware till after the argument, at which the clauses were not read, as I recollect, that we had power, after hearing the matter on the merits, as an appeal court to confirm, reverse, or modify the decision of the justice, or make such other conviction, or order, or such order as to costs, as we might think just.

I doubt if the statute intended we should exercise the jurisdiction of an appeal court to hear the matter on the merits, until, as a matter of fact, a majority became satisfied, by perusing the depositions, that an offence had been committed. If there is any authority, not binding, to the contrary, I am not prepared to follow it. I have carefully read the three clauses to be construed—and it seems to me, beyond question, that, having satisfied ourselves after having read the depositions, merely and for the sole and only purpose of being satisfied, that *primâ facie* an offence of the nature described had been com-

mitted, we should then, and by that operation of the judicial mind, become transformed into an appeal court for hearing the cause upon the merits.

Nor do I understand we should, upon good grounds being shewn, be compelled to so construe this statute as to be compelled in all cases to exclude other evidence on the hearing the appeal, even though that would be inconvenient. Assuming that we have the power to read the depositions in hearing the charge upon the merits, the statute, I think, clearly shews that they are to be examined more rigidly than merely to know if, *primâ facie*, any offence at all was committed, and they are to be weighed and considered, and scrutinized closely, critically, and exhaustively, to ascertain the extent and nature of the acts and the animus of the offender, so as to be properly prepared to do something more than mechanically or automatically reduce the punishment, and upon that hearing we might reverse the conviction. Otherwise, how is it possible that we should be given so much greater and more extensive powers than the justices have.

If the true reading is merely at first to find out whether the slightest breach has been committed, and then to do just as the justice might have done, and nothing more or less, there would be no reason for weighing the depositions, or hearing the charge on the merits, and that power would not have been given to us. Since we know that at the close of the argument we had not satisfied ourselves that the proof was sufficient to support, at the very least, even an apparent case, and therefore were not prepared as a court of appeal to hear the charge of the prosecutor against the accused upon the merits, we should, I think, go through the form now, at least after we have become so satisfied, of offering to hear the parties, though it is not likely that they will trouble us, or take up time in the present case. Possibly they might convince us that we should hear further evidence. In this case, it seems to be an undoubted right of the defendant charged with the crime. If it seems

absurd that we should hear the depositions twice—and I by no means admit this—it is the clear and distinct absurdity of the legislation.

I do not pretend that we might not have satisfied ourselves first of an offence by perusing the depositions, and, on the same occasion, have heard the charge upon the merits, and made, or modified, or reversed, the decision, all before adjourning. The statute is not very explicit.

So far as the present case is to be affected, not much is involved, possibly, but the matter is of more importance where such a construction might now be adopted as, practically, to reduce, or modify, or make a new decision, and decide the costs under a statute, practically, without a hearing on the merits, or otherwise.

TOWNSHEND, J.:—As the conviction is defective in awarding a longer term of imprisonment than the statute permits, I can see no difficulty in the way of this Court amending it, and making it conform to the law. Under secs. 883 and 889, the most ample powers have been conferred upon the Court for that purpose, and, I think, we not only can, but are bound to do so. The proviso to section 889, says:

> "That the Court, or Judge, when so satisfied as aforesaid" (that is, from a perusal of the deposition, that an offence of the nature described in the conviction, has been committed), "shall, even if the punishment imposed or the order made, is in excess of that which might lawfully have been imposed, or made, have the like powers in all respects to deal with the case as seems just as are by section 883 conferred upon the Court to which an appeal is taken," etc.

Section 883 confers the broadest powers upon the Court notwithstanding any defect in such conviction, and notwithstanding that the punishment imposed is or may be in excess of that which might be lawfully imposed to hear and determine the

charge upon the merits, and to confirm, reverse, or modify the decision, and make such other conviction as to the Court seems just, and to exercise all the powers with the justices had, and enacts that such conviction shall have the same effect as if it had been made by such justice.

Surely, nothing could have been written more full and complete to enable this Court, on the material before it, to make a lawful conviction, no matter how defective it was in the first instance, provided the necessary evidence of the offence can be found in the depositions. This was the view adopted by the Court of Appeal of Ontario, in *The Queen* v. *Murdock*, 4 Can. Cr. Cas. 82, stated in the head note as follows:

> "If, on the return to a certiorari, the Court is satisfied, upon a perusal of the depositions, that an offence of the nature described in the summary conviction has been committed, the Court may hear and determine the charge upon the merits, as disclosed by the depositions, and may vary, confirm, reverse, or modify the decision of the justice."

A perusal of the depositions in this case can leave no doubt as to the commission of the offence for which defendant was tried and convicted, and, in my opinion, the conviction should be so amended or modified in respect to the punishment as is necessary to comply with the law.

GRAHAM, E.J.:—This is an application to quash a conviction made under the Acts of 1888 (Canada), ch. 14, sec. 38, which has been removed into this Court by a writ of certiorari.

The defect is, that the term of imprisonment imposed in default of payment of the penalty, is six months, whereas it could not, under the general provision in the Code, exceed three months, there being no term specified in the special section above mentioned for the case of default of payment of the penalty. The prosecutor claims that it should be amended by reducing the term.

Section 889, of the Criminal Code, 1892, provides:

"No conviction, or order, made by any justice . . . shall, on being removed by certiorari, be held invalid for any irregularity, informality or insufficiency therein, provided that the Court, or Judge, before which or whom the question is raised, is, upon perusal of the depositions, satisfied that an offence of the nature described in the conviction . . . has been committed, over which such justice has jurisdiction, and that the punishment imposed is not in excess of that which might have been lawfully imposed for the said offence . . . provided that the Court, or Judge where so satisfied, as aforesaid, shall, even if the punishment imposed . . . is in excess of that which might lawfully have been imposed . . . have the like powers in all respects to deal with the case as seems just, as are, by section 883, conferred upon the Court to which an appeal is taken under the provisions of section 879."

Turning back to section 883, we find in it the following words:

"In every case of appeal from any summary conviction . . . the Court, to which such appeal is made, shall, notwithstanding any defect in such conviction, . . . and notwithstanding that the punishment imposed, may be in excess of that which might lawfully have been imposed, . . . hear and determine the charge . . . on which such conviction . . . has been had . . . upon the merits, and may confirm, reverse, or modify the decision of such justice, or may make such other conviction . . . in the matter as the Court thinks just, . . . and such conviction . . . shall have the same effect, and may be enforced in the same manner as if it had been made by such justice. The Court may also make such order as to costs to be paid by either party as it thinks fit."

The defendant contends that the Court must be satisfied, upon a perusal of the depositions, that the offence charged was

committed, and must also re-try the case by having the witnesses orally examined before it, before amending the conviction. That would be inconvenient, at least, particularly in a case in which only the wrong sentence has been passed, and all that remains to be done, is to pass the right sentence.

The powers conferred upon the County Court (in case of defect in the conviction, or excessive punishment), are: (1) to hear and determine the charge upon the merits; (2) reverse or modify the decision; (3) make such other conviction as the Court thinks just. This Court on certiorari, is to have the like powers.

The County Court has not the depositions before it (sec. 888); but this Court, in such a case, has, and is to satisfy itself from a perusal of them that the offence has been committed.

As the application to quash the conviction, brought up upon a writ of certiorari, usually takes place before a Court of Appeal (as in Nova Scotia), where the facts are brought forward and disposed of upon evidence already taken, there would be a strong presumption that the powers conferred are to be exercised according to the practice of the Court.

There is nothing in the expression, "hear and determine," which limits the investigation to oral testimony. The words, "hear," and "hearing," were expressions most commonly used to express the act of the Court in disposing of cases upon evidence already taken.

The expression, "heard and determined," on appeals from justices, is satisfied without a trial by witnesses. *The King* v. *Cawston*, 4 Dowl. & Ry., 445. If the case has to be tried by witnesses, *de novo*, why make it a condition that the Court should be satisfied (that the offence has been committed), only upon a perusal of the depositions? The defendant's rights would be amply guarded if the provision was that it should be satisfied upon affidavit, a very usual way of applying for amendment, if, afterwards, a conviction could only take place upon a trial *de novo*.

It is not the practice in Ontario, I infer, to hear the witnesses over again, in order to apply section 899. I can find no case in any other province, except one from the North-West Territories, upon the point.

The note to *Rex* v. *Murdock*, 4 Can. Cr. Cas. 82, which was an application for discharge on habeas corpus, is as follows:

> "If, on the return to a certiorari, the Court is satisfied, upon a perusal of the depositions, that an offence of the nature described in the summary conviction has been committed, the Court may hear and determine the charge upon the matter as disclosed by the depositions, and may vary, confirm, reverse, or modify the decision of the justice. The Court has power to so amend a summary conviction, returned on certiorari, whether the certiorari is one preliminary to a motion to quash the conviction, or in aid of a writ of habeas corpus."

Osler, J.A., delivering the judgment of the Court of Appeal, said:

> "The effect of these two sections of the Code, however, now is that, if satisfied, upon a perusal of the depositions, that an offence of the nature disclosed in the conviction has been committed, the Court may hear and determine the charge upon the merits as disclosed by the depositions returned in the certiorari, and may vary, confirm, reverse, or modify the decision of the justice, or may make such order as they think just."

The discharge was refused.

In *Reg.* v. *Spooner*, 4 Can. Cr. Cas. 209, also an application to discharge on habeas corpus, Street, J., delivering the judgment of the High Court of Justice for Ontario, said:

> "To avoid any possibility of the appearance of straining the law against the prisoner, by upholding the conviction and giving to her every benefit of her objections to which she is entitled, I think we should amend the convic-

tion and modify the sentence, by reducing it from one year to six months, and the order to be taken out on this motion will set forth that we have exercised the powers conferred upon us by section 889, of the Code by so doing. In other respects, the rule *nisi*, should be discharged."

In *Rex* v. *Meikleham*, 10 Can. Cr. Cas. 382, Meredith, C.J., delivering the judgment of the High Court of Justice for Ontario, upon a rule *nisi* to quash a conviction, brought up on certiorari, concluded the judgment:

"I therefore agree with my learned brothers that the provisions of section 889 must be applied, and that we should determine that an offence of the nature described in the conviction has been committed by the applicant, and that the conviction should be amended so as to make it one for selling liquor without the license required by law, and the conviction as so amended affirmed."

And the conviction was amended and the motion refused.

In *The Queen* v. *Whiffin*, 4 Can. Cr. Cas. 141, Rouleau, J., of the Supreme Court of the North-West Territories, after quoting this section, says: "This, no doubt, gives me the right to adjudicate *de novo* on the evidence given before the magistrate."

In England, the Queen's Bench Division, under 12 & 13 Vict. ch. 45, sec. 7, is given a similar power in the following words: "It shall be lawful for the Court, upon such terms as to payment of costs . . . to amend such order or judgment, and to *adjudicate* thereupon as if no such omission or mistake had existed."

Perhaps "adjudicate" is a slightly different expression from this, but it might as well be contended that the Queen's Bench Division could only determine the case by hearing the witnesses orally. To shew that this is not the practice, I refer to *Reg.* v. *Walker*, 45 J. P., 682, where the punishment was reduced. *Reg.* v. *Higham*, 7 E. & B. 557; *Reg.* v. *Hellingsley*, 28 L.J.M.C. 167; *R.* v. *Lundie*, 31 L.J.M.C. 157.

In my opinion, the term of imprisonment for non-payment of the penalty should be reduced to three months, the conviction amended accordingly, and the motion dismissed, but without costs.

MEAGHER, J., concurred.

RUSSELL, J.:—It is admitted that the conviction is bad, because of excess in the term of imprisonment. It is also conceded that this Court can make the conviction good, or make a good conviction if an offence has been committed of the nature described in the conviction. The only question seems to be, (and this, I think, is one that was not raised at the argument by counsel for either party) whether the statute provides for two distinct hearings, one to ascertain whether an offence of the nature charged in the conviction has been committed, and the other to try the case on its merits and determine whether the very offence charged in the information has been committed, or any offence upon which the defendant could, on such information, be convicted.

The ascertainment, under section 889, that an offence of the nature charged in the conviction has been committed seems to presuppose an argument, a perusal of the depositions and an adjudication, and it would seem to be a very absurd piece of legislation that all these solemnities should be a mere preliminary to the real hearing of the case. The difficulty, if there is any, arises from the fact that the method adopted is that of legislation by reference, or something akin to that. If the course of procedure had been expanded in section 889 it would, no doubt, have been made clear and simple, but I think that, in having recourse to section 883, we are at liberty to make some allowances for the method of legislation that has been adopted. Section 883, when used in the case of appeals, for which it is primarily designed, I have little doubt, makes a hearing on the merits a condition precedent to the exercise of the large powers of reversal, modification, etc., that follow.

But when the procedure of section 883 is adapted to the case of a conviction brought up under section 889, I do not think it calls for a second hearing on the merits, if there has been one already, as I think there should be, at the time when the question is raised as to the validity of the conviction, if there are any merits to be urged. This hearing, I think, must take place on the depositions before the Court.

In this present case, if the defendant had any cause to shew why he should not be convicted, he had an opportunity at the argument, when his case would have been heard on its merits. I think it was fully understood at the argument that there were no merits.

Conviction amended.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE RIDDELL, J., IN CHAMBERS.

THE KING v. ROBINSON.

Habeas corpus—First application premature—Second writ upon altered circumstances—Grounds available on first application res judicata—Sentence of imprisonment on summary conviction— Computation from date of passing sentence—Illegal order for bail after conviction—Escape—Mens rea—Lawful excuse—Prisons Act R.S.C. 1906, *sec.* 148, *sec.* 3—*Rev. Cr. Code* 1906, *secs.* 185, 196.

1. After a return to a writ of *habeas corpus* and an order refusing discharge thereunder, a second writ of *habeas corpus* may afterwards be granted if the circumstances have altered, *ex gr.*, on the expiry of a term of imprisonment which was current on the first application.
2. On the second motion to discharge no objection should be considered which might have been taken upon the first application.
3. Upon a summary conviction of the defendant and the passing of sentence of four months' imprisonment, for breach of a provincial law, the magis-

trate of his own motion required the defendant to enter into a recognizance to appear when called upon (a procedure not authorized in such cases) and upon doing so the defendant was released. The defendant having been afterwards imprisoned under a warrant issued two months after the date of sentence, held that the term of imprisonment is to be counted from the day of passing sentence and that the defendant was not liable as upon an escape to make up the period for which he was so at liberty, as there was no *mens rea* and the magistrate's action was a "lawful excuse" *quoad* the defendant.

ARGUED: June 27, 1907.
DECIDED: July 3, 1907.

THIS was a motion for the discharge of the prisoner after the issue of a second writ of *habeas corpus* for the same object, under the circumstances set out in the judgment.

TORONTO, June 27, 1907.

J. B. Mackenzie, for the motion.
J. R. Cartwright, K.C., Deputy Attorney General, *contra*.

TORONTO, July 3, 1907.

RIDDELL, J.:—

On the 17th January, 1907, the applicant was convicted by and before Peter Ellis, police magistrate, for a second offence against the Liquor License Act, and sentenced to be imprisoned for the space of four months.

Instead of at once having him conveyed to the common gaol, the magistrate allowed him to go free, taking his recognizance to appear when called upon.

On March 27th, without further notice to him, a warrant was issued by the police magistrate for his arrest, and he was, the following day, arrested and incarcerated in the common gaol at Toronto.

A writ of *habeas corpus* having been granted, a motion was made before me for his discharge on April 26th, 1907. The papers

being on their face regular, I refused to order his discharge, reserving leave to move for a new writ upon the expiry of four months from the day of sentence. Upon application made, I granted a writ June 25th, and upon the return a motion was made for the discharge of the prisoner, June 27th.

It was objected that the second writ was irregular, and should not have been granted; and *Taylor* v. *Scott* (1898), 30 O.R. 475, was cited in support of that proposition. I do not agree. The *ratio decidendi* of *Taylor* v. *Scott* is, that by R.S.O., 1897, ch. 83, sec. 6, an appeal lies to the Court of Appeal from the decision of a Judge before whom a person deprived of his liberty has been brought by *habeas corpus*, remanding him (see p. 478), and, therefore, in case such person does not appeal, the matter is *res adjudicata*. Whether the case of *Taylor* v. *Scott* was well decided under the facts and circumstances of the case, is not for me to inquire. Of course, I should follow it were it in point. And whether R.S.O. 1897, ch. 83, sec. 6, prevails over sec. 121 of R.S.O. 1897, ch. 245, so that one imprisoned as the applicant here would have the absolute right to appeal to the Court of Appeal; or whether, if not, the fact that an appeal is given only if "the Attorney General for Ontario certifies that he is of opinion that the point in dispute is of sufficient importance to justify the case being appealed," takes the case out of the rule in *Taylor* v. *Scott*, I do not stop to consider. That case deals with a finding by a Judge that could be appealed; and it was held that the proper course for one to pursue, if dissatisfied with a decision adverse to him, is to appeal to the Court of Appeal, and not apply to another Judge, according to the practice at the common law, and that if he fails to take the appeal given him by the statute of 29 & 30 Vict. ch. 45 (D.), he must be bound by the judgment as *res adjudicata*.

Here, however, the former writ was granted before the expiration of the four months of imprisonment inflicted; the present writ after. There has been a change of circumstances. The former proceeding was premature, and there is no adjudication upon the matter now before the Court.

The case is really like the civil action of *Barber* v. *McCuaig*

(2) (1900), 31 O.R. 593. In that case an action had been brought, which failed in the Supreme Court (1898), 29 S.C.R. 126, because the plaintiff had not exhausted her remedies against the mortgaged lands and certain persons named. Afterwards, having exhausted her remedies as aforesaid, she brought a new action, alleging the same facts as in the former action, and that she had exhausted the said remedies. Upon defence of *res judicata* being set up, the learned Chief Justice of the Common Pleas, in a carefully considered judgment, held that no such plea could be successfully pleaded, where the former action failed by reason of the fact that it was prematurely brought. I think the same rule applies here, and that I had the right to grant the new writ upon the alteration of circumstances; but I think that such a writ should not be granted upon any ground which might have been taken upon the former application.

I consider, therefore, the one objection only—namely, that the term of imprisonment has expired.

The term of imprisonment begins on and from the day of passing sentence—see R.S.C. 1906, ch. 148, sec. 3—and, consequently, the full term here has long since expired.

But it is claimed that the facts of this case constitute an escape, and, therefore, the applicant here must serve the term equivalent to the whole amount of the imprisonment imposed: see R.S.C. 1906, ch. 146, sec. 196. An escape is defined by R.S.C., ch. 146, sec. 185, thus: "Everyone is guilty of an indictable offence, and liable to two years' imprisonment, who, having been sentenced to imprisonment, is afterwards, and before the expiration of the term for which he was sentenced, at large within Canada without some lawful cause, the proof whereof shall lie on him." Here the applicant was at large before the expiration of the sentence, and the whole question is whether he has shewn "lawful cause" for being so at large. The taking of bail was admittedly beyond the powers of the magistrate, and, perhaps, the magistrate would be liable for a voluntary escape or a negligent escape at the common law; and it may be that the provisions of the Criminal Code, ch. 146, are wide enough to cover his case. And if the present applicant

had by force or artifice, by craft or guile, brought about his release, he would, undoubtedly, have been guilty of an escape, both at the common law and under the Code sec. 183. Much learning upon this subject may be found in Russell on Crimes, vol. I., bk. II., ch. xxx., pp. 567 *et seq.*, of the 5th ed., and in Archbold's Criminal Pleading and Evidence, 22nd ed., pp. 978, *et seq.*, and in similar books. If, indeed, the applicant had taken any part, however small—*e.g.*, by requesting or urging it—in procuring his release, he might well be considered guilty; but the facts here show quite a different state of things. After sentence, he was allowed to go away, and shortly thereafter he was brought back by the magistrate, accompanied by the license inspector, who was also the informant, told that he must enter into a recognizance, and, upon doing so, he was sent away. Giving all effect to the maxim that every man must be held to know the law, I decline to hold that Robinson, doing as he was told by a magistrate, could be said to be "at large . . . without some lawful cause." That is, of course, lawful *quoad* him; however unlawful it may have been in the abstract or *quoad* the magistrate. (This latter is for the Attorney-General to consider.) All the cases of escape reported are cases in which the prisoner knew or ought to have known from the circumstances that he had no right to his liberty. There was a *mens rea*. Here the prisoner had no reason to think everything was not being done regularly, and no *mens rea* can be seen.

Any doubt should be resolved *in favorem libertatis*, and I have the less hesitation in so doing, as the Attorney-General may appeal if he thinks the point is of sufficient importance.

The applicant should be released, and he should have his costs from the magistrate. The magistrate not being a party before me, I cannot order him to pay these costs. But upon ordering, as I do, that no action is to be brought against any person for the imprisonment, I direct that this protection shall extend to the magistrate only upon his paying within 30 days the costs of these proceedings, which I fix at $40.

Order for discharge.

Note: *Sentence of imprisonment — Commencement of term — When defendant must be personally present for sentence.*

Section 3 of the Prisons and Reformatories Act, R.S.C. 1906, ch. 148, is taken from the Criminal Code, 1892, sec. 955(7). The provision originated with the Criminal Procedure Act of 1869, 32-33 Vict. ch. 29, section 91 of which is in similar terms except that it did not contain the words "unless otherwise directed in the sentence" which appeared in the Code of 1892 and are embodied in the present Prisons Act, R.S.C. ch. 148. The section is as follows:

> "The term of imprisonment in pursuance of any sentence shall, unless otherwise directed in the sentence, commence on and from the day of passing such sentence, but no time during which the convict is out on bail shall be reckoned as part of the term of imprisonment to which he is sentenced."

The rule at common law is that when any corporal punishment is to be inflicted the defendant must be personally before the Court at the time of pronouncing the sentence. 25 Am. & Eng. Encyc., 2nd ed., 296; *Rex* v. *Harris*, I Ld. Raym. 267; *Reg.* v. *Templeman*, 1 Salk. 56.

It would seem that a person convicted of felony could not waive his right to be present in Court at the time of pronouncing sentence, and that it was error to render sentence in his absence, though such absence was voluntary or wilful. *Reg.* v. *Williams*, 18 W.R. 806; *Harris* v. *People*, 138 Ill. 63.

Pronouncing sentence while the defendant is absent from Court will not entitle him to a new trial or to be discharged, but in such case the Appellate Court will remand the cause with directions to render judgment according to law. 25 Am. & Eng. Encyc., 2nd ed., 298.

When a fine only is to be imposed it is discretionary with the Court to require the presence of the defendant when sentence is rendered. *Reg.* v. *Templeman*, 1 Salk. 56; *Duke's case*, 1 Salk. 400; *Rex* v. *Hann*, 3 Burr. 1786. There is the same discretion though the offence is punishable by fine or imprisonment or both in the discretion of the Court. *Reg* v. *Kinglake*, 18 W.R. 806.

Ordinarily the trial Court may at any time during the term at which the sentence was rendered and before execution has

Note—*Continued.*

Sentence of imprisonment—Commencement of term—When defendant must be personally present for sentence.

begun, amend or vacate the sentence and render a new sentence in accordance with law. *Reg.* v. *Fitzgerald*, 1 Salk. 401; *Rex* v. *Price*, 6 East 323; *Rex* v. *Leicestershire*, 1 M. & S. 442. And even though the execution of the sentence has already commenced, the Court may at any time during the term at which the sentence was rendered, modify it by remitting part of the punishment.

The object of permitting several distinct offences to be charged in the same indictment by means of separate counts, is to avert from both parties the burden of two or more trials by permitting them to be tried together. When this has been done the Court may proceed to sentence as if the defendant had had a separate trial for each offence.

Where the different counts in an indictment refer to and charge the same offence the practice is either to render sentence on each count to run concurrently (Archbold's Crim. Pldg., 13th ed., 62), or to render a single sentence upon all the counts for the entire offence. *Ryalls* v. *Reg.*, 11 Q.B. 795, 3 Cox C.C. 254; *O'Brien* v. *Reg.*, 2 Cox C.C. 122.

[COURT OF APPEAL FOR ONTARIO.]

BEFORE MOSS, C.J.O., AND OSLER, GARROW, MACLAREN AND MEREDITH, JJ.A.

THE KING v. BRINKLEY.

Bigamy—British subject—Leaving Canada for purpose of contracting bigamous marriage in foreign country—Invalid foreign divorce of first wife—Domicil—Mens rea—Cr. Code 1892, *sec.* 275—*Revised Cr. Code* 1906, *sec.* 307.

1. A foreign divorce obtained by the wife of a British subject domiciled in Canada without service of process on the husband or submission on his part to the jurisdiction of the foreign Court is ineffective to dissolve a marriage performed in Canada, although the wife had some years before applying for the divorce left her husband and taken up her residence in the foreign country.
2. A British subject married and domiciled in Canada who goes to the United States accompanied by another woman for the purpose of marrying her there and who goes through the form of marriage there with her and forthwith returns with her to Canada is guilty of bigamy and is properly convicted thereof in Canada under sec. 307 of the Revised Criminal Code 1906, notwithstanding such foreign divorce obtained by his first wife.
3. That part of sec. 307 of the Revised Criminal Code 1906 (former sec. 275 of the Cr. Code of 1892) which purports to include in the offence of bigamy punishable by Canadian Courts, the case of a domiciled Canadian leaving Canada with intent to go through a form of marriage with another woman and doing so in a foreign country during his wife's lifetime, is *intra vires* of the Dominion Parliament.
4. An absence of *mens rea* is not to be inferred from the knowledge of the husband that a divorce had been decreed by the foreign Court on his wife's application and from his having first obtained legal advice that he could legally marry again.

Re Bigamy Sections of Criminal Code (1897), 1 Can. Cr. Cas. 172, followed.

DECIDED: March 14, 1907.

Case reserved by the junior Judge of the county of Huron, sitting in the County Judge's Criminal Court of that county, under the provisions of part LIV. of the Criminal Code, 1892.

The defendant was charged with the offence of bigamy under sec. 275, sub-sec. 4, of the Criminal Code, 1892, now R.S.C. 1906, ch. 146, sec. 307, sub-sec. 4, which provides that no person shall be liable to be convicted of bigamy in respect of having gone through a form of marriage in a place not in Canada, unless such person, being a British subject resident in Canada, leaves Canada with intent to go through such form of marriage.

He was and always had been a British subject, and was married to one Rosa Card in the county of Huron on April 14th, 1897. In August, 1903, his wife left him and went to reside in the State of Michigan, U.S. She then intended to separate from her husband, had no intention of ever returning to Canada, and thenceforth made her home in the State of Michigan.

In January, 1906, she obtained a decree of divorce from the defendant in the Circuit Court for Wayne county, Michigan, on the ground stated in the decree of "extreme cruelty." The defendant was not served with any notice of the divorce proceedings and took no part therein.

In April, 1906, the defendant went with one Emily Florence Picot to Detroit in the State of Michigan and there went through a form of marriage with her before an officer duly qualified according to the laws of that State to perform the marriage ceremony. He left Canada with intent to go through the form of marriage with her, and immediately afterwards returned with her to his residence in the township of Goderich in the county of Huron, Ontario. Before obtaining his marriage license he had in his possession a copy of the said decree of divorce, and he had also obtained legal advice that the said decree was legal and binding, and that he was at liberty to marry again if he saw fit.

On these facts the learned county Judge found the defendant guilty of the charge laid, but reserved for the consideration of the Court of Appeal the following questions:—

1. Is the said decree of divorce granted by the Circuit Court of the State of Michigan upon January 15th, 1906, a valid and binding divorce and of any effect in the Pro-

vince of Ontario; and does it effect a valid dissolution of the marriage so as to constitute in law a good defence to the indictment?

2. Was the element of intent or *mens rea* removed by the fact of the defendant knowing that the decree of divorce had been granted and his having been advised that he could legally marry again?

After the case thus submitted had been argued and was standing for judgment, the learned Judge reserved the following further question:—

3. Is paragraph (*a*) of sub-sec. 1 of sec. 275 of the Criminal Code, 1892, *intra vires* the Parliament of Canada; and has the limitation imposed by sub-sec. 4 the effect of so qualifying said paragraph (*a*) as to bring the substantive enactment contained in said paragraph (*a*) within the provisions of the Parliament of Canada?

The case as originally reserved was argued on November 16th, 1906, and the further question afterwards submitted on the constitutional question, as above mentioned, on January 21st, 1907.

W. Proudfoot, K.C., for the defendant, contended as to question 1 that the wife was *bonâ fide* domiciled in Michigan so far as she could have a domicile different from that of her husband, and referred to *Bater* v. *Bater*, [1906] P. 209; *Armitage* v. *Attorney-General*, *Gillig* v. *Gillig*, [1906] P. 135; *In re Criminal Code Sections Relating to Bigamy* (1897), 1 Can. Cr. Cas. 172, 27 S.C.R. 461; Article on Constitutional Protection of Decrees for Divorce, 19 Harv. L.R., p. 586, and *Haddock* v. *Haddock* (1906), 201 U.S.R. 562, therein referred to; that so long as the defendant did not attack the divorce decree it was a good and valid decree no matter how service was effected: *Guest* v. *Guest* (1882), 3 O.R. 344; *Magurn* v. *Magurn* (1883-5), 3 O.R. 570, 11 A.R. 178; *Regina* v. *Brierley* (1887), 14 O.R. 525; *Regina* v. *Plowman* (1894), 25 O.R. 656, 19 C.L.T. 1, 38. As to question 2,

that the guilty intent must be found to justify conviction under our statute, and that the defendant went to Detroit with the *bonâ fide* intention of contracting a real marriage: *The Queen* v. *Tolson* (1889), 23 Q.B.D. 168; *Regina* v. *Prince* (1875), L.R. 2 C.C.R. 154.

[The argument of Mr. Proudfoot upon the constitutional point is fully stated in the judgment of Maclaren, J.A., *infra.*]

J. R. Cartwright, K.C., for the Minister of Justice of Canada and for the Attorney-General of Ontario, contended that a married woman cannot acquire a domicile apart from her husband so as to procure a divorce: *Bater* v. *Bater*, [1906] P. 209; *Attorney-General* v. *Armitage*, [1906] P. 135, and that both the first and second questions should be answered in the negative. He also cited *Sherras* v. *De Rutzen*, [1895] 1 Q.B. 918; and Archbold's Criminal Pleading and Evidence, 23rd ed., p. 33.

TORONTO, March 14, 1907.

OSLER, J.A. (after setting out the case submitted as above): —As regards the power of Parliament to enact section 275, subsections (1*a*) and (4) of the Criminal Code, I think it only necessary to say (1) that so far as this Court is concerned we ought to regard the question as disposed of by the judgment or opinion of the Supreme Court of Canada upon the very point, which was submitted for their determination in *In re Criminal Code Sections Relating to Bigamy*, 27 S.C.R. 461, 1 Can. Cr. Cas. 172. It was there held that these provisions were *intra vires* the Parliament of Canada. (2) If reasons for that conclusion are to be sought for they are well set forth and expounded in the judgment of the learned Chancellor Boyd in *Regina* v. *Brierly*, 14 O.R. 525. The later case of *Macleod* v. *Attorney-General for New South Wales*, [1891] A.C. 455, was decided upon a state of facts different in at least one important respect from those in the present case, and upon a statute

more extensive in its scope than our own, not being limited to British subjects resident in the colony. It therefore does not affect the reasoning upon which the judgment of the Supreme Court and of the Chancellor proceeded.

The question must, in my opinion, be answered in the affirmative.

As regards the first question in the case firstly submitted:

The defendant relies upon the Michigan divorce obtained at the instance of his wife as an answer to the indictment on the ground that it effected a valid dissolution of his marriage with her. But that marriage having been solemnized in Canada and the defendant having been at the time and always afterwards a British subject resident and domiciled there, and having never appeared to or taken part in the proceedings in the Michigan Court, I do not see how that Court ever acquired jurisdiction to dissolve it.

In *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517, it was held by the Judicial Committee of the Privy Council, after a full review of the authorities, that according to the principles of international law as administered in our Courts, the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve the marriage. The decision in the case, which is of general application and is fully stated in the headnote, is that

> "The permanent domicile of the spouses within the territory is necessary to give to its Courts jurisdiction so to divorce *a vinculo* as that its decree to that effect shall by the general law of nations possess extra-territorial authority. A so-called 'matrimonial domicile' said to be created by a *bonâ fide* residence of the spouses within the territory, of a less degree of permanence than is required to fix their true domicile, cannot be recognized as creating such jurisdiction."

We followed this decision in the recent case of *Rex* v. *Woods* (1903), 7 Can. Cr. Cas. 226, 6 O.L.R. 41. In the present case, it is true, the wife, though resident and domiciled in Canada at

the time of her marriage, had become a permanent resident of the foreign State when she brought her action for divorce there. But this, according to the *Le Mesurier Case*, could make no difference if her husband was not domiciled in that State: *Green* v. *Green and Sedgwick*, [1893] P. 89, where Barnes, J., says he finds "no case in which it has ever been decided that a man can be divorced from his wife by the laws of a country in which he has never been resident or domiciled"; *Harvey* v. *Farnie* (1880-2), 6 P.D. 35, 8 App. Cas. 43, 46; and see *Bater* v. *Bater*, [1906] P. 209; Dicey on the Conflict of Laws (1896), pp. 127, 163, 169, and cases there cited; Westlake on Private International Law, 4th ed., pp. 82, 86. Mr. Proudfoot cited the recent case of *Armitage* v. *The Attorney-General, Gillig* v. *Gillig*, [1906] P. 135, in which it was held that the Courts of this country would recognize the binding effect of a decree of divorce obtained in a State where the husband was not domiciled, if the Courts of the country or State of his domicile would recognize it. There, an American domiciled in New York, had married an Englishwoman in England. She went to the State of South Dakota, U.S., where she took proceedings for divorce, which were served upon the husband personally and to which he put in an answer and cross-claim. A decree of divorce was pronounced on her petition, and she afterwards married in the State of Colorado an Englishman always domiciled in England. Then she petitioned the English Court for a declaration of validity of that marriage, and the Court being satisfied by the evidence that the Courts of her first husband's domicile (New York) would recognize the validity of the decree of the South Dakota Court (on the ground that that husband had submitted himself to its jurisdiction), pronounced for the validity of the second marriage.

There is nothing in that case inconsistent with the decision in the *Le Mesurier Case*, but the contrary. The Court regarded the law of the State of the domicile—the State of New York—as that which affected and determined the status of the husband, and as that law recognized the validity of the South

Dakota decree, the wife who obtained it was free to marry again. The defendant is thus still left to demonstrate, if he can, that the law of his Canadian domicile will recognize the validity of the Michigan decree. This, however, for the reason already given, is, according to that law, denied. And see *Armytage* v. *Armytage*, [1898] P. 178, where Barnes, J., refers to the "American doctrine" that the wife may acquire a domicile of her own in the country of the matrimonial home. Here the wife had not acquired even such a domicile, as the State of Michigan had never become the matrimonial home of the parties.

Bater v. *Bater*, [1906] P. 209, follows and applies *Le Mesurier* v. *Le Mesurier*, holding that the domicile for the time being of the married pair when the question of divorce arises affords the only true test of jurisdiction to dissolve the marriage, and that the Court of the *bonâ fide* existing domicile has jurisdiction over persons originally domiciled in another country to undo a marriage solemnized in that other country.

See also *Guest* v. *Guest*, 3 O.R. 344; *Magurn* v. *Magurn*, 11 A.R. 178; *The Trial of Earl Russell*, [1901] A.C. 446.

We need not consider the recent case of *Haddock* v. *Haddock*, 201 U.S. 562. It has been severely criticized both in the United States and in England, but it is not necessary to invoke it to shew the invalidity of the Michigan decree.

Cases like *Ogden* v. *Ogden* (1906), 23 Times L.R. 158, shew that the Courts of the husband's domicile cannot undo a marriage solemnized in England between, *e.g.*, a domiciled Frenchman and an Englishwoman, in accordance with the requirements of English law, merely because it would be irregular in the country of the domicile by reason of the omission of some condition—such as the consent of parents in the case of a minor —required by the laws of that country.

The case of *Stevens* v. *Fisk*, decided by the Supreme Court of Canada in 1885, but not reported until 1906 (see Cameron's Canada Supreme Court Cases, p. 392), should perhaps be noticed. The parties were domiciled and resident in the State

of New York, where they were married in 1871. There was no ante-nuptial contract, and the husband got his wife's fortune from her trustees. Afterwards he went to Montreal, where he established a business and continued to reside. The wife followed him to Canada, but shortly afterwards returned to New York. In 1876 she obtained a decree of divorce from one of the Courts of the State of New York. The process in the action was previously served upon the husband, and he appeared by attorney at every stage of the proceedings. In 1881 the woman brought an action against him in the Courts of Quebec for an account of his administration and management of her property, which was defended on the ground that the New York divorce was of no force in the Province of Quebec, and that the plaintiff, being a married woman, had not been authorized in the manner prescribed by the Code of Civil Procedure to bring the action. The Court of Queen's Bench (appeal side), reversing the judgment of the trial Judge, decided against her on both grounds. This decision was reversed by the Supreme Court, Strong, J., dissenting. Ritchie, C.J., differing from his colleagues on this point, held that on the whole case it was to be assumed that the husband had never actually lost his domicile of origin, in which case of course the jurisdiction of the New York Court was incontestable. He also held, agreeing with Henry and Gwynne, JJ., (1) that the wife's decree having been obtained without fraud or collusion, it ought, upon the principle of the comity of nations, to be recognized as valid in Canada; and (2) that the husband, having submitted to the jurisdiction of the New York Court when served with the proceedings in the action, could not now be allowed to impeach it. But it was also held by a majority of the Court (Fournier, Henry and Gwynne, JJ.) that inasmuch as in the State of New York where the parties were married the wife could have sued the husband without previous authorization, she had by virtue of Article 14 of the Code the same right to sue as a *feme sole* in the Province of Quebec.

It was, therefore, unnecessary for the decision of the case

to determine the question of the validity of the divorce, and so far as anything said by any of the learned Judges on that subject conflicts with what has since been decided by the Judicial Committee, we are of course governed by the latter.

The first question submitted by the stated case must, therefore, be answered in the negative.

The question whether the fact of the defendant knowing that the decree of divorce had been granted and his having been advised that he could legally marry again was a defence, on the grounds that an absence of guilty intent or *mens rea* was thereby established, must also upon the authorities be answered in the negative.

In the recent case of *Sherras* v. *De Rutzen*, [1895] 1 Q.B. 918, Wright, J., speaking of the presumption that a knowledge of the wrongfulness of the act is an ingredient in every offence, says, at page 921, "that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered: *Nichols* v. *Hales* (1873), L.R. 8 C.P. 322. One of the most remarkable exceptions was in the case of bigamy. It was held by all the Judges on the Statute of 1 Jac. 1, ch. 11, that a man was rightly convicted of bigamy who had married after an invalid Scotch divorce, which had been obtained in good faith, and the validity of which he had no reason to doubt: *Lolley's Case* (1812), R. & R. 237. The dictum in that case that no sentence or Act of any foreign country can dissolve an English marriage *a vinculo matrimonii* for grounds on which it is not liable to be dissolved *a vinculo matrimonii* in England, was afterwards overruled in *Harvey* v. *Farnie* (1880), 6 P.D. 35, 44, but in other respects the decision is not affected.

Then the Criminal Code (1892), sec. 275, after defining in what the offence of bigamy consists, declares, sub-sec. 3, that "no one commits bigamy by going through a form of marriage —(*a*) if he or she in good faith and on reasonable grounds believes his wife or her husband to be dead, or (*c*) if he or she has been divorced from the bond of the first marriage."

The first is a question of fact; the second a question of law, *i.e.*, of our own law.

Sub-section 3(*a*) adopts the law as it had been laid down by the Court for Crown Cases Reserved in *The Queen* v. *Tolson* (1889), 23 Q.B.D. 168; but sub-sec. 3(*c*) contains no exception in favour of a person who *bonâ fide* believes, or is advised, that the bond of marriage has been dissolved by a divorce, and this, with the express enactment as to what the act of bigamy consists in, is strong to shew that no such exception was to be implied and that a valid divorce must be proved by the accused. That may well have been intended on grounds of public policy to prevent persons from setting up "divorces while you wait," which to common knowledge are so easily obtained in some of the Courts of the neighbouring country.

In some of those Courts the authorities on this subject seem to be in conflict: Am. & Eng. Ency. of Law, 2nd ed., vol. 4, p. 41. In Wharton's Criminal Law, 9th ed., vol. 1, sec. 88, it is said, "that the defendant honestly believed in the existence of a non-existent divorce is no defence."

The conviction must be affirmed.

MOSS, C.J.O. and GARROW, J.A., concurred.

MACLAREN, J.A.:—The defendant was charged, under sec. 275, sub-sec. 4, and sec. 276 of the Criminal Code (1892), with bigamy. He was tried in the County Judge's Criminal Court for the county of Huron and was found guilty. The Judge reserved two questions for this Court.

The case states that the defendant, a British subject, was married on April 14th, 1897, to Rosa Mary Card in the township of Colborne and county of Huron, where he then resided and has ever since resided and been domiciled.

His wife left him in August, 1903, and went to Grand Rapids, Michigan, intending never to return to him. In January, 1904, she went to Detroit, Michigan, where she has ever

since resided. On January 16th, 1906, she obtained a divorce there in the Circuit Court on the ground of "extreme cruelty," The defendant was not served with any notice of the divorce proceedings, took no part therein, and only became aware of them after the divorce was granted.

On April 12th, 1906, the defendant left Canada with one Emily Florence Picot, and went to Detroit with intent there to go through the form of marriage with her. On the following day the ceremony was performed by an officer duly qualified according to the laws of the State of Michigan to perform the marriage ceremony. Before going to Detroit the defendant had obtained a certified copy of the decree of divorce, and had obtained legal advice that the said decree was valid and binding, and that he was at liberty to marry again if he saw fit.

The two questions reserved by the county Judge are the following:—

1. Is the said decree of divorce granted by the Circuit Court of the State of Michigan upon the 15th day of January, 1906, a valid and binding divorce and of any effect in the Province of Ontario, and does it effect a valid dissolution of the marriage so as to constitute in law a good defence to the indictment?

2. Was the element of intent or *mens rea* removed by the fact of the defendant knowing that the decree of divorce had been granted and his having been advised that he could legally marry again?

On the first point Mr. Proudfoot argued that this case is distinguishable from *Rex* v. *Woods*, 6 O.L.R. 41, 7 Can. Cr. Cas. 226, in this Court, as here the wife had *bonâ fide* acquired a home in Michigan, and the Court of that State had consequently jurisdiction. In addition to other authorities, he relied upon the recent English cases of *Bater* v. *Bater*, [1906] P. 209, and *Armitage* v. *The Attorney-General*, *Gillig* v. *Gillig*, [1906] P. 135.

It has now for many years been well settled law that it is the Courts of the domicile of the parties that have jurisdiction on the question of divorce, and the Courts in England and this

Province have adopted the rule that the Courts of a foreign country when duly authorized by the laws of that country have jurisdiction, in the absence of collusion or fraud, to dissolve the marriage of parties domiciled in such foreign country at the commencement of the proceedings for divorce: *Dolphin* v. *Robins* (1859), 7 H.L.C. 390; *Shaw* v. *Gould* (1868), L.R. 3 H.L. 55; *Harvey* v. *Farnie*, 8 App. Cas. 143; *Le Mesurier* v. *Le Mesurier* [1895], A. C. 517; *Bater* v. *Bater*, supra; *Magurn* v. *Magurn*, 11 A.R. 178; *Rex* v. *Woods*, 6 O.L.R. 41, 7 Can. Cr. Cas. 226.

The decision in the foregoing case of *Bater* v. *Bater* did not go beyond what had been previously decided in *Harvie* v. *Farnie* and other cases, namely, that the Courts in England would recognize the validity of a divorce granted by the Court of the country where the parties were domiciled when the proceedings were taken, even though it was granted for a ground which would not be sufficient in England, and although it was an English marriage, and the parties had been previously domiciled there.

The decision in *Armitage* v. *The Attorney-General* carries it one step farther, and lays down the rule that a divorce will be recognized as binding in a State where the husband was not domiciled, provided the Courts of the country or State of his domicile would recognize the validity of the decree. The divorce in question there was one obtained by a wife in the State of South Dakota whose husband was domiciled in the State of New York. Expert evidence having been given that the divorce would be recognized as valid in the State of New York, Sir Gorell Barnes, P., held that the same credit should be given to it in England as in New York where the parties were domiciled.

The expert testimony was given and the English judgment rendered before the decision by the Supreme Court of the United States in the celebrated and much canvassed case of *Haddock* v. *Haddock*, 201 U.S. 562. That case settled the principle that a decree of divorce rendered in a State which had

jurisdiction only over the plaintiff without being based on personal service on, or personal jurisdiction over, the defendant, had no binding force or effect beyond the State in which it was rendered. Apparently it would not have affected the divorce in question in the *Armitage Case*, as there the husband had been personally served with the Dakota process, and appeared and made counter charges against the wife. The *Haddock Case* really has no bearing upon that case or the present one; it simply goes to shew that the divorce in this case would have no binding force or effect in the United States outside the State of Michigan. It is to be noted that great stress is laid on the absence of personal service on the defendant and on the want of submission to the jurisdiction. The domicile of the parties for this purpose is determined by that of the husband. Dicey, in his Conflict of Laws, lays the rule down as follows at p. 127: "The domicile of a married woman is during coverture the same as, and changes with, the domicile of her husband;" and at p. 129: "Though a wife may acquire a home for herself, she can under no circumstances have any other domicile or legal home than that of her husband." In support of these propositions he cites *Warrender* v. *Warrender* (1835), 2 Cl. & F. 488; *Dolphin* v. *Robins*, 7 H.L.C. 390; and *Yelverton* v. *Yelverton* (1859), 1 Sw. & Tr. 574.

It appears to be doubtful whether even a judicial separation would give the wife a right to acquire a separate domicile for herself. See the remarks of Lord Kingsdown in *Dolphin* v. *Robins*, supra, at p. 420.

It follows that although the defendant might become a resident of and acquire a home in the State of Michigan, she could not acquire a legal domicile that would give the Courts of that State a jurisdiction that our Courts would recognize.

Even if the husband had been served with notice and had submitted to the jurisdiction, the decree would still have been a nullity on account of his being legally domiciled in this country when the proceedings were taken. See *Armitage* v. *The Attorney-General*, [1906] P. 135 at 140.

. It appears from the stated case that the defendant was not served with any notice of the divorce proceedings and took no part therein, and further that he only became aware of the decree from seeing a report of it in a newspaper. The facts of the present case are almost identical with those in *Shaw* v. *The Attorney-General* (1870), 2 P. & D. 156, in which the Judge Ordinary says, at p. 162: "No case has ever yet been decided that a man can, according to the laws of this country, be divorced from his wife by the tribunals of a country in which he has never had either domicile or residence. He has never submitted himself, either directly or inferentially, to the jurisdiction of such a Court, and has never, by any act of his own, laid himself open to be affected by its process, if it never reaches him. A judgment so obtained has therefore, in addition to the want of jurisdiction, the incurable vice of being contrary to natural justice, because the proceedings are *ex parte* and take place in the absence of the party affected by them." This has been approved and followed in *Le Suer* v. *Le Suer* (1876), 1 P.D. 139, and in *Green* v. *Green*, [1893] P. 89.

The first question should therefore in my opinion be answered in the negative.

In support of the argument that the defendant was relieved by the fact that he knew that the decree for divorce had been granted and his having been advised that he could legally marry again, the case of *Regina* v. *Tolson*, 23 Q.B.D. 168, was cited and relied upon. It is to be observed that in that case the defendant had been credibly informed and believed that her first husband was dead before she contracted the second marriage. A mistake on a question of fact, however, is different from a mistake on a question of law. The former, if material, may excuse or relieve; the latter does not.

The maxim *ignorantia juris non excusat* has long been applied in English criminal law. See *Regina* v. *Crawshaw* (1860), 8 Cox C.C. 375; *Rex* v. *Bailey* (1800), R. & R. 1; *McNaghten's Case* (1843), 10 Cl. & F. 200, at p. 210. The rule is put thus in Archbold's Criminal Pleading, 23rd ed., at p. 33:

"Ignorance of the law will not excuse from the consequences of guilt any person who has capacity to understand the law."

It has been embodied in our Criminal Code, sec. 14, as follows: "The fact that an offender is ignorant of the law is not an excuse for any offence committed by him."

No case was cited to us in which this defence had ever been put forward, and I have not been able to find any in this country or in England. There have been a number of cases in the United States, where the law has been generally laid down as above stated. See *State* v. *Goodenow* (1876), 65 Me. 30; *Hood* v. *State* (1877), 56 Ind. 263; *Davis* v. *Commonwealth* (1877), 13 Bush. (Ky.) 318; *State* v. *Armington* (1878), 25 Minn. 29; *People* v. *Weed* (1883), 29 Hun. 628; *State* v. *Hughes* (1882), 58 Iowa 165; Wharton's Criminal Law, 9th ed., p. 388.

The only case to the contrary I have found is *Squire* v. *State* (1874), 46 Ind. 459, and there the mistake may have been as to some question of fact connected with the divorce.

The general rule of law is that a person cannot be convicted in a proceeding of a criminal nature unless it can be shewn that he had a guilty mind. In *Cundy* v. *LeCocq* (1884), 13 Q.B.D. 207, at p. 210, Stephen, J., however, says: "In old time, and as applicable to the common law or to earlier statutes, the maxim (*actus non facit reum, nisi mens sit rea*) may have been of general application; but a difference has arisen owing to the greater precision of modern statutes. It is impossible now . . . . to apply the maxim generally to all statutes, and the substance of all the reported cases is that it is necessary to look at the object of each Act that is under consideration to see whether and how far knowledge is of the essence of the offence created."

In *Rex* v. *Woodfall* (1770), 5 Burr. 2661, at p. 2667, Lord Mansfield says: "Where an act in itself indifferent, if done with a particular intent, becomes criminal, then the intent must be proved and found; but when the act in itself is unlawful, the

proof of justification or excuse lies on the defendant and on failure thereof, the law implies a criminal intent."

In many statutes where the former class of offence is created the intent is indicated by the use of such words as "maliciously," "fraudulently," "wilfully," "negligently" or "knowingly." We have an illustration of this in the very section of the Code under consideration, where it is made an ingredient of the offence of bigamy in case of the second marriage taking place abroad that the accused "leaves Canada with intent to go through such form of marriage."

In *The Bank of New South Wales* v. *Piper* [1897], A.C. 383, where the offence charged was the sale of wool that was under a lien, the Privy Council declined to read into the section creating the offence the words "with a view to defraud." They go on to say, at pp. 389-40: "In cases when the statute requires a motive to be proved as an essential element of the crime the prosecution must fail if it is not proved. On the other hand, the absence of *mens rea* really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent."

This I consider is the proper test where the accused relies upon the absence of *mens rea*, and where that would be a good ground of defence. In the present case the defendant was well aware of the facts; his only mistake was as to the law, which is no defence.

Besides the foregoing classes of offences there are exceptional cases where the Legislature has enacted that a man shall be deemed guilty even although he might prove the absence of negligence or of a guilty mind under the foregoing rule. These are said by Wright, J., in *Sherras* v. *De Rutzen*, [1895] 1 Q.B. 918, chiefly to fall under three heads: (1) Acts not criminal in any sense, but in the public interest prohibited under a penalty, such as those relating to the revenue, etc.; (2) statutes relating to some, and perhaps all nuisances; (3) cases which are

criminal in form, but really only a summary mode of enforcing a civil right. In our own Province we have illustrations of such offences where licensees are held liable for acts of their servants done without their knowledge and against their will.

The present case cannot, however, be said to come within this last class of exceptional cases; it falls rather within the second of the classes mentioned by Lord Mansfield.

I am of opinion that the second question should also be answered in the negative.

After the foregoing had been written, the following additional question was reserved by the learned county Judge:

> "Is paragraph (*a*) of sub-sec. 1 of sec. 275 of the Criminal Code *intra vires* of the Parliament of Canada, and has the limitation imposed by sub-sec. 4 of said sec. 275 the effect of so qualifying said paragraph (*a*) as to bring the substantive enactment contained in paragraph (*a*) within the power of the Parliament of Canada?"

It was argued before us by Mr. Proudfoot that the opinions of the Judges of the Supreme Court, reported in 27 S.C.R. 461, when they were asked by the Governor-in-Council, under 54-55 Vict. ch. 25(D.), substantially the same question as is now submitted to us, were not really binding upon us. He urged further that the case was submitted *ex parte*; that such opinions have not the force of a judgment; that the Chief Justice dissented from the opinions of the other members of the Court; that his view was the correct one; and that *Macleod* v. *Attorney-General* [1891], A.C. 455, was a higher authority and should have been followed by the Supreme Court.

The subject of the submission of such questions to the Court or Judges, and the weight to be given to their opinions or answers thereto as authorities has been a matter which has evoked discussion and conflicting opinions.

Since the English Judges have ceased to sit in the House of Lords as members thereof the House has been accustomed from time to time to ask the advice of the Judges "in dubious cases."

In 1834 the Judges declined to answer a question put to them on the ground that it was not "confined to the strict legal construction of existing Acts of Parliament": *In re the London and Westminster Bank,* 1 Cl. & F. 191.

In 1843 the House asked a series of questions relating to the defence of insanity by persons accused of crime. Tindal, C.J., and Maule, J., pointed out "the extreme and almost insuperable difficulty of applying such answers to cases in which the facts are not brought judicially before them;" and that general answers not relating to a particular case or for a particular purpose might embarrass the administration of justice when they are cited in criminal trials: *McNaghten's Case,* 10 Cl. & F. 200, at pp. 204, 208. The House, however, affirmed their right to require the Judges to answer abstract questions on existing law, Lord Lyndhurst, L.C., and Lords Brougham, Campbell, Cottenham and Wynford speaking strongly in support of the claim. The rule there laid down in the answers of the Judges is that which has since been generally followed: Archbold's Criminal Pleading, 23rd ed., p. 26.

Such questions were also formerly put by the Crown to the Judges. In 1760 a question regarding courts-martial was put, and Lord Mansfield and the other Judges, while answering the question in the affirmative, said that if the matter should come before them judicially they might change their opinions if there then appeared to be sufficient ground for doing so. This is said to be the last case so submitted by the Crown: 2 Eden, 371.

On the constitution of the Judicial Committee of the Privy Council by 3 & 4 Wm. IV. ch. 41, Imp., as an appellate Court, it was provided by sec. 4 that His Majesty might refer to it "for hearing or consideration any such other matters whatsoever as His Majesty shall think fit, and the Committee shall thereupon hear or consider the same, and advise His Majesty thereon." Such references have been made from time to time, one of those in which this Province was specially interested having been the boundary case between Ontario and Manitoba in 1884.

From 1875 to 1891 the answers of the Supreme Court of Canada to the questions submitted by the Governor-in-Council under 38 Vict. ch. 11, sec. 52(D.), were given in brief categorical form without any reasons. They usually related to governmental or administrative action, and were not included in the regular reports of the Court. The amending Act, 54-55 Vict. ch. 25(D.), provided that the Court should give its opinion with the reasons therefor in like manner as in the case of a judgment upon an appeal to the Court, and that the opinion, although advisory only, should for all purposes of appeal to the Privy Council be treated as a final judgment between parties. It also provided that any province, class or person specially interested should be notified and might be heard.

In 1890 the Ontario Legislature passed an Act for expediting the decision of constitutional and other provincial questions, providing for the reference of such questions by the Lieutenant-Governor-in-Council to the provincial Courts (now R.S.O. 1897, ch. 84). It contained provisions as to appeal, and that reasons should be given, and the Dominion Act, 54-55 Vict. ch. 25(D.), above referred to, was largely copied from it. Section 6 declared, however, that "the opinion of the Court shall be deemed a judgment of the Court," words which were not introduced into the Dominion Act. Other provinces have copied the Ontario Act, and it has been held by the Supreme Court that such cases are not appealable to it, as Provincial Legislatures cannot extend its jurisdiction: 27 S.C.R. 637. A number of them have, however, been appealed to the Privy Council.

The difficulty and sometimes the impossibility of giving categorical answers to abstract or hypothetical questions has been pointed out at various times in the Courts before which such questions have come. Besides those already mentioned, reference may be made to the *Local Option Case, Attorney-General for Ontario* v. *Attorney-General for the Dominion* [1896], A.C. 348; *In re Provincial Fisheries* (1895-8), 26 S.C.R. 444, [1898], 7 A.C. 700; *Re Lord's Day Act*, 1 O.W.R. 312, 35

S.C.R. 581, *sub nom. Attorney-General* v. *Hamilton Ry.*, [1903] A.C. 524; *Re Ontario Medical Act* (1906), 13 O.L.R. 501.

In *Re Manitoba Schools* (1893), 22 S.C.R. 577, at p. 677, Taschereau, J., in a dissenting opinion, expressed a doubt as to the power of the Dominion Parliament to enact the provisions as to submitting such questions to the Supreme Court, but this doubt does not appear to have found further expression.

In the same opinion he took a strong position as to the want of binding authority in answers or opinions in such references, and subsequently, in *In re Provincial Fisheries*, 26 S.C.R. 444, at p. 539, he expressed himself even more strongly in the following words: "Our answers are merely advisory, and we have to say what is the law as heretofore judicially expounded, not what is the law according to our opinion. We determine nothing. We are mere advisers, and the answers we give bind no one, not even ourselves." It is to be noted that it appears from the context that the learned Judge was speaking of abstract and hypothetical questions. Even as to these his words as to the answers being confined to an expression of what had been previously judicially expounded, and not of the opinions of those giving the answers, would appear to be warranted only when the questions have been framed in that particular way.

It is worthy of note that the opinions and answers in the very case in which the foregoing language was used, were subsequently quoted as authorities in an opinion concurred in by a majority of the Judges of the same Court in a subsequent reference under the same section: see *In re International and Interprovincial Ferries* (1905), 36 S.C.R. 207, at p. 217. The position taken with reference to such opinions or answers by the Privy Council is succinctly stated by Lord Watson in the *Local Option Case*, [1896] A.C. 348, at p. 370. This was an appeal from the answers of the Supreme Court to seven questions submitted by the Governor-General-in-Council. The first six questions referred to the powers of the provinces as to liquor prohibition, and the seventh as to the Ontario Local

Option Act. The seventh question, to which the Supreme Court had given a negative answer, was taken up first, and after a full discussion was answered in the affirmative. Lord Watson then went on to say: "Their Lordships will now answer briefly, in their order, the other questions submitted by the Governor-General of Canada. So far as they can ascertain from the record, these differ from the question which has already been answered in this respect, that they relate to matters which may possibly become litigious in the future, but have not as yet given rise to any real and present controversy. Their Lordships must further observe that these questions, being in their nature academic rather than judicial, are better fitted for the consideration of the officers of the Crown than of a Court of law. The replies to be given to them will necessarily depend upon the circumstances in which they will arise for decision; and these circumstances are in this case left to speculation. It must therefore be understood that the answers which follow are not meant to have, and cannot have, the weight of a judicial determination, except in so far as their Lordships may have occasion to refer to the opinions which they have already expressed in discussing the seventh question."

They then proceed to give brief replies to the remaining questions, in some of them referring to what they have said in answering the seventh. I think this fairly means that they consider that their opinion expressed at length in answer to a question on a concrete case of existing legislation or law may be treated as a judgment; while the answers, qualified or otherwise, given to abstract or hypothetical questions, are not to have the weight of a judicial determination.

Practically to the same effect is the Privy Council decision in *In re the Lord's Day Act, Attorney-General* v. *Hamilton Ry.*, [1903] A.C. 524. There the first question as to an Ontario statute, reversing the opinion of this Court, was answered in the negative, rendering it unnecessary to answer the second question.

With regard to the remaining questions, which were ab-

stract in their nature, the Lord Chancellor goes on to say, at p. 529, that answers to them "would be worthless as being speculative opinions on hypothetical questions. It would be contrary to principle, inconvenient, and inexpedient, that opinions should be given upon such questions at all. When they arise, they must arise in concrete cases, involving private rights; and it would be extremely unwise for any judicial tribunal to attempt beforehand to exhaust all possible cases and facts which might occur to qualify, cut down and override the operation of particular words when the concrete case is not before it."

It is also worthy of note that in the *Manitoba Liquor Act Case, Attorney-General of Manitoba* v. *Manitoba License Holders' Association*, [1902] A.C. 73, Lord Macnaghten, in giving the judgment of the Privy Council, refers several times to the judgment of that body in the *Ontario Local Option Case* as a "decision," and as "the judgment of this Board," and as having settled and removed objections that were raised to the legislation in question in the later case.

In the *Prince Edward Island and New Brunswick Cases*, [1905] A.C. 43, the opinions of the Supreme Court are also referred to as "decisions" of that body in the Privy Council judgment.

I am not aware of any case in which the opinions or judgments of either the Privy Council or of the Supreme Court have been treated otherwise than as judgments of these bodies when they have been given without qualification or reserve under such circumstances as those indicated by Lord Watson in the judgment or opinion upon the seventh question submitted to them; nor am I aware of any instance in which such decisions have not been followed by the Courts, which would recognize the judgments of these bodies as binding authorities.

The questions submitted to the Supreme Court as to the bigamy sections of the Criminal Code, and answered in 27 S.C.R. 461, fully meet the requirements and conditions laid down by the Privy Council. They are in effect the same as

that now reserved for us by the learned County Court Judge, and in my opinion are to be treated as a judgment, the opinions or answers not having been given under any reserve. It is true that no counsel appeared to argue the invalidity of the sections, but the Court, if it so desired, might have requested counsel to represent that side of the question.

But even if that decision is not binding upon us, I am of opinion that the law was laid down correctly by the majority of the Supreme Court. As pointed out by them, it does not appear that at the time of the alleged offence in *Macleod* v. *The Attorney-General,* Macleod was either domiciled or resident within the colony of New South Wales, and no part of the alleged offence was committed within its territory or jurisdiction. In the cases provided for by the sections in question of the Criminal Code, it must be shewn that the accused at the time of the commission of the offence (1) is a British subject, (2) is resident in Canada, (3) has left Canada to go through the form of marriage in the foreign country. All these are important ingredients, and to my mind clearly distinguish our law from the interpretation sought to be put upon the New South Wales Act by the prosecution in the *McLeod Case.* The recent case in the Privy Council of *Attorney-General of Canada* v. *Cain,* [1906] A.C. 542, although not directly in point, is instructive.

I am consequently of opinion that the further question of the learned County Court Judge should be answered in the affirmative.

MEREDITH, J.A.:—The accused is a British subject, and he left Canada for the purpose of going through the "form of marriage" in respect of which he is charged with bigamy; he therefore brought himself quite within the words of sub-sec. 4 of sec. 275, and is guilty of bigamy unless (1) he was "divorced from the bond of his first marriage," or (2) married in an honest reasonable belief that he was so divorced—if such a belief be a good defence to the charge.

The Michigan divorce was, under the cases in this country, plainly invalid here, whatever its effect may have been in that State or elsewhere in the United States of America.

No case was referred to upon the other question. But in the case *Regina* v. *Tolson*, 23 Q.B.D. 168, it was held that a *bonâ fide* belief on reasonable grounds of the death of the accused's husband was a good defence to a charge of bigamy, though the husband had been absent for less than seven years and though the statute expressly made seven years' absence, without knowledge of his being alive, a defence. Does it follow that a *bonâ fide* and reasonable belief of the validity of the divorce is also a good defence? I think not, for two reasons. The question is one of law, namely, whether the divorce was valid in Canada; and the accused is presumed to have known that it was not. It is not whether it was valid under the foreign law, which would be a question of fact, and in regard to which there would be no such presumption. Then sec. 275 deals fully with the subject; it adopts the ruling in the *Tolson Case*, but does not make it applicable to a divorce. Except for *Lolley's Case* there is a great lack of authority upon this subject; see *Rex* v. *Lolley*, Russ. & Ryan 237; but, as is frequently so, cases are to be found in the Courts of the United States of America dealing pointedly with the question: they, however, present the not infrequent difficulty of conclusions opposed to one another reached in different Courts: see *Squire* v. *State*, 46 Ind. 459; *Davis* v. *Commonwealth*, 13 Bush. (Ky.) 318; and *State* v. *Annington*, 25 Minn. 29.

If I am right in these conclusions, the conviction is easily supported. The accused, a British subject domiciled in Canada, left Canada for the purpose of entering into, and entered into, a marriage contract which was, as he knew, bigamous according to the laws of Canada.

But if the learned County Court Judge has found, or shall find, that the accused married the second time in the actual belief, in good faith, of the validity of the divorce and the

more so if he has found, or shall find, that such belief was reasonable, the sentence to be passed will no doubt be mitigated accordingly.

The foregoing opinion was written at the conclusion of the argument of the first of the reserved cases, on the 16th day of November, 1906; and the following opinion at the conclusion of the second of the reserved cases, on the 21st day of January, 1907.

The statement that the several Legislatures of the Canadian Dominion have, unitedly, unlimited power to legislate respecting all things within its territorial limits, is, on the one hand, plainly quite too broad a proposition; while, on the other hand, the statement that such legislative power is strictly limited to matters wholly within such territorial limits, is too narrow a proposition.

The error of the former proposition is apparent when the fact that the Constitution of the Dominion rests on Imperial legislation, and, generally speaking, is lawfully alterable only by such legislation; and such examples as the Extradition Act, the Deportation Act, the enactment which has long made it a crime to bring stolen property into Canada, and the legislation upon which officers, in England and other countries, are maintained and regulated for political, commercial and other purposes, shew the error of the latter. So that the question involved in this case cannot be dealt with upon either principle, but must rest on the power conferred on the Dominion by the enactment creating it.

Under that enactment, the Parliament of Canada is enabled to make laws for the peace, order and good government of Canada in relation to criminal law and marriage and divorce, among many other things. And, under that power, that Parliament has enacted, in effect, that, subject to certain exceptions, any British subject, resident in Canada, who, being married, leaves Canada with intent to go through a form of marriage with a person not his wife, or not her husband, and does

go through such form of marriage anywhere out of Canada, is guilty of a crime, and liable to a prescribed punishment.

The enactment relates to an act done out of Canada, but that is only one circumstance in the constitution of the crime; and it is immaterial whether that act is, or is not, lawful, or is, or is not, a crime where it is done. It cannot be said that the gravamen of the offence is in the act so done; it is quite harmless, so far as the enactment goes, without the other ingredients, (1) a British subject, (2) residence in Canada, and (3) leaving Canada with the intent to do the act. The wrong struck at was an evasion of the law of Canada, in favour of peace and morality, by the simple expedient of stepping over an international boundary line, to go through a form of marriage. How can it then be said that the punishment is for a crime committed beyond the territorial limits of the Dominion? Or that there is really any infringement of any such principle as that "crime is local"? The purpose of the enactment was to compel residents of Canada, who were also British subjects, to obey the laws of Canada in respect of marriage and divorce.

If this enactment be a dead letter, what is there to prevent the indulgence, without limit, in duality or plurality of wives or husbands in Canada, provided there is no breach of the law in such respects as are provided against in sec. 278 of the Criminal Code? Such a state of things would obviously be against the peace, order and good government of Canada. It is always to be borne in mind that the offender must still be resident in Canada, as well as a British subject, when the form of marriage is gone through out of Canada; if residence or allegiance be changed before the act, there is no offence. The enactment deals only with those who are yet residing in Canada; and why should there not be jurisdiction over them? By changing residence or allegiance after making oneself amenable to the law cannot, of course, relieve from its penalties. It cannot turn guilt into innocence.

The enactment in no sense infringes upon any Imperial en-

actment upon the subject, but is a modification of the latter enactment, and in no sense inconsistent with it.

The enactment in question in the case of *McLeod* v. *Attorney-General for New South Wales*, [1891] A.C. 455, was one of an entirely different character from that in question, and from even the Imperial enactment, as far as one can tell from the report of the case. Unless a restricted interpretation were given to it, it would have been an enactment beyond the scope of even Imperial legislation. I cannot perceive how that case in any sense governs this.

Whatever may be the effect of the opinions of the Judges of the Supreme Court of Canada in the stated case of *In re Criminal Code sections relating to Bigamy* (1897), 27 S.C.R. 461, 1 Can. Cr. Cas. 172, or the answer given by that Court to the question submitted in that matter, as an authority, I am of opinion that the legislation in question is *intra vires*, and therefore that the question, which troubled the learned County Court Judge, should be answered in the affirmative.

Conviction affirmed.

Note: *Jurisdiction of Federal Parliament over extra-territorial offences of domiciled British subjects—Bigamy.*

See *Re Bigamy sections*, 1 Can. Cr. Cas. 172 and note to same, page 205; *R.* v. *Woods*, 7 Can. Cr. Cas. 226, and note to same, page 235; *R.* v. *Sellars*, 9 Can. Cr. Cas. 153, and note to same, page 155.

[SUPREME COURT OF NEW BRUNSWICK.]

BEFORE TUCK, C.J., AND HANINGTON, LANDRY, McLEOD AND GREGORY, JJ.

Ex parte GREY.

Summary conviction—Irregularity—Killing two dogs—Two convictions on one information—Return of single amended conviction to certiorari—Separation of fines and damages—Information by wife of owner—Award of costs and damages to owner—Revised Cr. Code (1906), *secs.* 537, 710, 1124.

1. Where separate convictions have been irregularly made upon one information for killing two dogs, the magistrate may return to a *certiorari* a single amended conviction conforming to the minute of adjudication and apportioning the fine and damages for the killing of each dog.
2. The award of costs to the owner of the dog on whose behalf his wife had laid the information instead of to the informant is a mere irregularity which is cured by sec. 1124 of the Revised Code.

ARGUED: April 12, 1906.
DECIDED: June 15, 1906.

In Hilary term last Barry, K.C., obtained a rule absolute for a *certiorari* and a rule *nisi* to quash two convictions made by John E. O'Brien, a justice of the peace for the County of Gloucester, against William J. Grey for killing two dogs. The rules were granted on the grounds that the conviction did not follow the minute of adjudication, and that as the information and summons were for a single offence there could not be two convictions.

In the return to the *certiorari* the convicting magistrate sent the original convictions and an amended conviction in which the objections were cured, and which ordered the costs to be paid to the complainant instead of to the prosecutor.

FREDERICTON, April 12, 1906.

Byrne shewed cause, contending that the magistrate acted within his right in returning the amended conviction, and, as the objections were cured by the amendment, the rule *nisi* to quash should be discharged. He referred to *Chaney* v. *Payne*, 1 Q.B. 712; *King* v. *Barker*, 1 East 186; *Charter* v. *Greame*, 13 Q.B. 216; *Queen* v. *Turk*, 10 Q.B. 540; *Selwood* v. *Mount*, 9 C. & P. 75.

Barry, K.C., supported the rule, contending that the act of the magistrate was not the amending of an informal or irregular conviction, but the making of a new conviction. If the conviction can be amended the power is in the Court and not in the convicting magistrate. He also claimed that the amended conviction was bad as it ordered the costs to be paid to the complainant instead of to the prosecutor. (*Byrne*: This point is not open, it was not mentioned on moving for the rule.) It arises out of the amended conviction. (The Court: We will hear Mr. Byrne in reply on this point and consider it.)

Byrne in reply. If the order to pay the costs to the complainant is a ground for quashing the conviction it can be amended, but I contend it is no ground under Criminal Code secs. 883, 889.

FREDERICTON, June 15, 1906.

The judgment of the Court was now delivered by

TUCK, C.J.:—This is a conviction made by John E. O'Brien, a justice of the peace for the County of Gloucester, against the defendant, William Grey, junior, for killing two dogs, "Lion" and "Barney," the property of Joseph Chamberlain. The complaint is made by Vina Chamberlain, the wife of Joseph, and charges that the defendant "did unlawfully kill two dogs, the property of "Joseph Chamberlain, called Barney and Lion."

At the trial the defendant pleaded guilty, and the magis-

rate entered convictions for two offences; and a return of this conviction, or rather two convictions, was made to the clerk of the peace.

The rule absolute for a *certiorari* and rule *nisi* to quash were granted on the following grounds: (1) The convictions are bad in that they do not follow the minute of adjudication; and (2), the information and summons being for a single offence, the justice was not warranted in entering up two convictions, and the convictions are bad.

In his return to the writ of *certiorari* the justice, besides returning with the proceedings, etc., the two convictions first made, also certifies that the conviction thereto annexed marked "A" was an amended conviction made in obedience to the said writ of *certiorari*.

The amended conviction is for only one offence, and adjudges said defendant "to forfeit and pay for killing the dog Barney the sum of $5, together with $20, being the amount of injury done, and the sum of $5 for the killing of the dog Lion, together with $20, being the amount of injury done, and also to pay to the said Joseph Chamberlain the sum of $10.60 for his costs in this behalf to be paid forthwith." This amended conviction agrees with the minute of adjudication as made by the magistrate.

Two objections are made to this amended conviction. First, it is said that the magistrate had no power to amend the conviction; and, secondly, that the amended conviction is wrong, as it orders the costs to be paid to the owner of the dogs instead of the prosecutor.

As to the first objection, it seems to me that the authorities are clear and go to shew that the justice could amend the conviction. In *Selwood* v. *Mount*, 9 C. & P. 75, the head note says:

> "Magistrates having convicted a party under the Highway Act, they drew up a conviction and returned it to the clerk of the peace, and on an action being brought against

them, they put in the conviction returned to the clerk of the peace (which was open to some formal objections), and also another conviction, drawn up afterwards in a more formal shape," it was held, "*Semble*, that there is no impropriety in this course of proceeding, provided the latter conviction is according to the truth and supported by the facts of the case."

In *The King* v. *Barker*, 1 East 186, the marginal note is "the Court refused a criminal information against a magistrate for returning to a writ of *certiorari* a conviction of a party in another and more formal shape than that in which it was first drawn up, and of which a copy had been delivered to the party convicted by the magistrate's clerk; the conviction returned, being warranted by the facts." See the judgment of Lord Kenyon, Chief Justice, in that case; also see *The Queen* v. *Turk*, 10 Q.B. 540, and *Charter* v. *Greame*, 13 Q.B. 216.

I think also that the other objections, that the costs were ordered to be paid to the owner of the dogs, instead of the prosecutor, his wife, is not tenable. If it was a mistake it was a natural one, for Joseph Chamberlain was the real prosecutor. But, at all events, a case like this is provided for in sections 883 and 889 of the Criminal Code, 1892, which enact that the judgment on appeal from a summary conviction shall be on the merits, and that the conviction shall not be held invalid for irregularity. Here the facts are only one way. Grey killed the dogs and was properly convicted, fined and ordered to pay costs. No reason has been given why the conviction should not stand. The rule *nisi* to quash must be discharged.

Rule discharged.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE TOWNSHEND, J., GRAHAM, E.J., RUSSELL AND LONGLEY, JJ.

THE KING v. CLARK (No. 2).

Summary conviction—Limitation of time for prosecution—Separate section of statute—Conviction not shewing conformity with limitation—Amending information at hearing—Waiving right of adjournment—Canada Temperance Act, R.S.C. 1906, *ch.* 152, *secs.* 134, 143, 145—*Revised Cr. Code,* 1906, *secs.* 724, 1142.

1. Where the limitation of time for bringing a prosecution is contained in a separate section of the statute creating the offence, it is not essential to the validity of the conviction that it should shew on its face that the limitation has not been exceeded.
2. Neither the summary conviction nor the warrant of commitment for a third offence against the Canada Temperance Act need shew that the information leading to a prior conviction was laid within the statutory period of three months after the offence.
3. If an amendment is made to the information at the trial of a summary conviction matter and the defendant then consents to have the trial proceed on the amended information rather than have the trial adjourned, he thereby waives any right he may have had to an adjournment on the ground of a material variance in the charge and cannot afterwards object that he had not sufficient time to prepare his defence.

ARGUED: November 17, 1906.
DECIDED: November 28, 1906.

Motion on notice to the prosecutor and stipendiary magistrate, referred to the Court *en banc,* by Graham, E.J., on the return of orders in the nature of writs of habeas corpus and certiorari, under chapter 181, of the Revised Statutes of Nova Scotia, entitled, "Of securing the Liberty of the Subject," for an order to discharge the defendant out of the common gaol at Amherst, where he was confined under a warrant of commitment, made on October 16, 1906, and based on the following conviction:

"County of Cumberland, town of Springhill, to wit: Be it remembered that on the sixteenth day of October, in the year of our Lord, one thousand nine hundred and six, in the town of Springhill, in the County of Cumberland, John P. Clark is convicted before me, the undersigned, John M. Hunter, stipendiary magistrate in and for the town of Springhill, in the said County of Cumberland, for that he, the said John P. Clark, did, between the 24th day of September, A.D. 1906, and the 16th day of October, A.D. 1906, in the town of Springhill, in the County of Cumberland, unlawfully keep intoxicating liquor for sale contrary to the provisions of the second part of The Canada Temperance Act, then in force in and throughout the said County of Cumberland. And it also appearing to me that the said John P. Clark was previously, to wit on the 25th day of May, A.D. 1906, at the town of Springhill, aforesaid, before me the said John M. Hunter, then stipendiary magistrate in and for the town of Springhill, aforesaid, duly convicted of having unlawfully sold intoxicating liquor, contrary to the provisions of the second part of The Canada Temperance Act, then in force in and throughout the said County of Cumberland, between the 20th day of March, A.D. 1906, and the 22nd day of May, A.D. 1906, in the town of Springhill aforesaid, said conviction being a conviction for a second offence against the provisions of the second part of The Canada Temperance Act. And it also appearing to me that the said John P. Clark was previously, to wit, on the 23rd day of March, A.D. 1906, at the town of Springhill, aforesaid, before me the said John M. Hunter, then stipendiary magistrate in and for the town of Springhill, aforesaid, again duly convicted of having unlawfully kept for sale, intoxicating liquor contrary to the provisions of the second part of The Canada Temperance Act, then in force in and throughout the said County of Cumberland, between the 20th day of December, A.D. 1905, and the 20th day of March, A.D. 1906, in the town of Springhill, aforesaid,

said conviction being a conviction for a first offence against the provisions of the said second part of the said Act.

"I adjudge the offence of the said John P. Clark, hereinbefore firstly mentioned to be his third offence against the provisions of the said second part of The Canada Temperance Act, then and now in force in and throughout the said County of Cumberland, D. M. Mattinson being the informant.

"And I adjudge the said John P. Clark for his said third offence to be imprisoned in the common gaol of the said County of Cumberland, at Amherst, in the said County of Cumberland, there to be kept with hard labour for the space of four calendar months.

"Given under my hand and seal the day and year first above mentioned at the town of Springhill, in the county aforesaid.

(Sgd.) JOHN M. HUNTER, (L.S.)
Stipendiary magistrate in and for the town of Springhill, in the County of Cumberland."

The affidavits filed disclose the following facts: On October the 15th, A.D. 1906, at the town of Springhill, Nova Scotia, a search warrant, to search the applicant's premises for liquor was issued and executed (said warrant and information therefor not being before the Court), and a complaint on information and belief, for the offence of unlawfully keeping for sale intoxicating liquor, was sworn to on an uncertain date, alleging the offence to have been committed between the 24th day of September, A.D. 1906, and the 15th day of October, A.D. 1906.

A warrant was issued thereon setting out the offence as having been committed between the 24th day of September, A.D. 1906, and the —— day of October, A.D. 1906. The applicant was arrested on this warrant, a copy of which was served on him, under section 843 of the Code, after he was taken to the justice's office. He remained in jail over night, declaring himself ready for trial on that charge, and on the next day, Oc-

tober 16, 1906, the information was amended and resworn in the presence of the accused, as charging him with an offence between September 24, 1906 and October 16, 1906.

After the information was re-sworn, the defendant pleaded "not guilty," and the trial went on, and he was convicted. The minute of conviction made and served on the defendant and annexed to his affidavit had the very date left blank, as in the warrant on which he was first arrested, and the said minute adjudged the forfeiture and destruction of the seized liquor, but this adjudication was omitted from the conviction.

The motion was made on the following grounds:

(1) That the conviction for the "first" offence (recited in the above conviction) did not shew that it was made for an offence committed within the statutory limitation of three months from the date of the said conviction therefor.

(2) That the proceedings connected with the arrest and conviction were of such a character as to be contrary to natural justice, and were so irregular and such a departure from the prescribed procedure, as to warrant a refusal to uphold them.

HALIFAX, November 17, 1906.

John J. Power, for the prisoner.
J. L. Ralston, for the prosecutor, contra.

HALIFAX, November 28, 1906.

GRAHAM, E.J.:—This is an application to discharge the defendant under proceedings in the nature of a habeas corpus.

The offence for which he was committed was a third offence under The Canada Temperance Act, and it is contended that the conviction is bad because the recitals in this conviction of the previous convictions are bad.

[The learned judge here quoted the recital of the former convictions.]

The contention is that the convictions should affirmatively shew that the informations were respectively laid within three months after the offences of which the defendant was convicted.

The authorities shew that it is competent to charge a defendant with an offence committed during a period extending between two dates.

In 2 Hawkins Pleas of the Crown, ch. 25, sec. 82, it is said:

"Yet it hath been solemnly resolved that a conviction of deer stealing setting forth the offence between the eighth and twelfth of July, etc., is sufficient."

The commitment being perfectly regular on its face, and not disclosing this supposed defect, the defendant obtained an order in the nature of a certiorari to bring up the conviction and the proceedings before the magistrate.

While the conviction does not disclose the dates of the laying of the informations in the respective first and second prosecutions, the other proceedings were brought up to disclose them, and they shew that the informations were respectively laid within the three months' limit. But the defendant claims the right by this mode of collateral attack to say that these convictions are void on their face.

The form of conviction given by the statute does not contain words to indicate whether information was laid or to indicate that it was laid within three months after the offence.

The limitation of three months is provided in a section subsequent to the penal section, namely, section 106.

I cannot successfully distinguish this case from *Wray* v. *Toke*, 12 Q.B. 492. That was a trespass for the seizure of goods of a publican—under a conviction for a penalty for permitting disorderly conduct in his house. The conviction was made the 5th of December, 1856, and the charge was that he did on the 28th day of September, 1856, at, etc. The conviction is set out in the case. The head note is: "It need not be averred in such conviction that the penalty was proceeded for within three calendar months next after the committing of the offence."

Hawkins, for the publican, contended:

"Secondly, it is a fatal defect that the prosecution does not appear by express averment to have taken place within three calendar months of the offence. The date assigned to the offence, 'on the 28th day of September,' cannot assist, for the day laid in a conviction is immaterial and does not bind to any proof. *Rex* v. *Chandler,* 1 Salk. 378. The form of conviction says, 'here state the offence and the time and place where committed.' That requires statement of a time properly averred to be within three months."

Erle, J.:—"The limitation of time is in a clause subsequent to the penal section, and would not that be matter of defence?"

Lord Denman, C.J., afterwards delivering the judgment of the Court, said:

"It was secondly objected that it does not appear that the prosecution was within three months after the offence. The answer is, first, that the limitation being entirely distinct from the enactment creating the offence is matter of defence and need not be noted in the conviction, and, secondly, that the form given by the statute dispenses with the mention of it, had it otherwise been necessary."

The principle here enunciated may be in conflict with that determined in *Reg.* v. *Adams,* 24 N.S.R. 559, although in that case there was a direct attack on the conviction, which did not disclose that the three months' limit had not run, by a motion to quash it.

But this decision of the Queen's Bench in England, which was not cited in *Reg.* v. *Adams,* 24 N.S.R. 559, is binding on us, and is to be followed, rather than our own decision, since as the Privy Council said in *Trimble* v. *Hill,* 5 App. Cas. 345, "In their view it is of the utmost importance that in all parts of the empire, where English law prevails, the interpretation of that law by the Courts should be as nearly as possible the same."

The decision of *Wray* v. *Toke,* was followed in Ontario in *Reg* v. *Strachan,* 20 U.C.C.P. 185.

It is contended that the defendant had not sufficient time allowed to him after an amendment made at the trial.

The information originally sworn alleged an offence between the 24th September, 1906, and the 15th of October, 1906. Upon an application made by the prosecutor at the trial the "15th" was amended to the "16th," and the information resworn. This was made to embrace the offence of keeping for sale liquor which had been seized on the 15th on the defendant's premises on a search warrant issued under the Act.

The affidavits shew that the defendant was expressly informed of the amendment and declared himself ready for trial on the amended charge, and that he pleaded to it and was given the fullest opportunity to examine witnesses and make his defence.

If a defendant does not ask for time or object to a case going on after an amendment made, indeed, if he requests the prosecutor to go on rather than have delay, I think under ordinary principles he cannot afterwards object that he had not sufficient time.

The section, Canada Temperance Act 116, which provides for the substitution of a different offence by way of amendment contemplates that a defendant may waive his right to an adjournment. It provides as follows:

> "But if it appears that the defendant has been materially misled by such variance, such justices, etc., shall thereupon adjourn the hearing of the case to a future day unless the defendant waives such adjournment."

I refer to the cases of *The Queen* v *Bradley*, 63 L.J.M.C. 183; *Reg.* v. *Hughes*, 4 Q.B.D. 614; *The Queen* v. *McNutt*, 28 N.S.R. 380, in which case "there was an objection not subsequently withdrawn."

The application will be dismissed.

TOWNSHEND, J.:—I fully assent to the judgment delivered, but I wish to draw attention to the fact that in the case of *The*

Queen v. *Adams*, 24 N.S.R. 559, on which Mr. Power relied, the question before the Court had particular reference to the Nova Scotia License Act, R.S. (1900), ch. 100, and in the judgment given, the question appears to have been lost sight of, which was before the Court in that case.

RUSSELL and LONGLEY, JJ., concurred with GRAHAM, E.J.

Application refused.

[YUKON TERRITORIAL COURT.]

BEFORE CRAIG J., IN CHAMBERS.

THE KING v. HALL.

Bail before committal for trial—Amount of bail—Stealing letter bags—Rev. Cr. Code, sec. 699.

1. A Superior Court has jurisdiction to admit the accused to bail while the preliminary enquiry is pending before the magistrate.
2. In making an order for bail pending the preliminary enquiry a Judge of a Superior Court may impose the condition that the proposed bail shall not only make affidavits of justification but attend before a magistrate for examination as to their qualification.

DECIDED: October 30, 1907.

Motion for bail for the accused, who was charged with having on 30th July, 1907, stolen two post letter bags containing gold dust to the value of about $40,000.

C. W. C. Tabor, for the prisoner.
H. S. Tobin, for the Crown.

DAWSON CITY, October 30, 1907.

CRAIG, J.:—The accused has been up and remanded several times without any evidence being tendered on behalf of the Crown, who on the last remand put in an affidavit of the sergeant of police who is in charge of the investigation, stating that material witnesses were required from Fairbanks in Alaska, and from California. There is no certainty of when these witnesses can come, being outside of the jurisdiction; but it was indicated by the affidavit and by the statement of the Crown counsel that six weeks or two months at least will elapse before these witnesses can arrive. Some indication, however, of the nature of the Crown's case is given to me by counsel, the statement being that this gold dust was stolen from the post office at Dawson while the mail was in transit between Alaska and the State of Washington, and that Hall was one of the parties to the theft. Two other persons were arrested for the same theft, one now under arrest at White Horse, and the other who committed suicide after his arrest. A very small quantity of the gold dust has been recovered, and it was indicated that a large quantity of it was sold in the banks here, and that Hall was the intermediary in the sale, the Crown counsel and the detective stating that they have a strong case against the accused. Of course, the guilt or innocence of the accused is not a matter for me to settle upon this application, but it does enter into the consideration of the amount of bail, and as to the probability of the accused attending on his trial, if admitted to bail.

It is suspected that a large quantity of the gold dust is still hidden in and about Dawson. The accused is theoretically entitled to bail. The main question to consider is whether he will attend upon his trial, and to take such bail as will secure his attendance.

It is urged by the Crown that a Judge of this Court has no authority under the Code to hear an application for bail until the prisoner is committed for trial, and cites as an authority for that proposition *Regina* v. *Cox* (1888), 16 O.R. 228, and the citation of the same case in Seager's Magistrates' Manual, p. 241.

On a reading of that case I do not think it carries out the

views of the Crown counsel, but is to the contrary effect, and I think that section 699, formerly section 603, gives authority to entertain the application.

"The power of the Court is to be exercised in the discretion of the Court, and no one can claim its benefit de jure": Burn's Justice, p. 370.

In this case application was made for bail before the magistrate, who, without hearing argument or a full statement of reasons, refused the bail, stating that he preferred the matter to come up before a Judge of the Territorial Court, and giving leave to make the application if leave was required.

A Judge should not admit a person to bail, where the magistrate has properly refused it, but I do not take this to be such a case. The magistrate has not finally refused it; he simply transferred the matter over. Under all the circumstances, I think I should deal with the application and dispose of the matter. The amount of money stolen is large. There is some chance of an accused person admitted to bail, recovering the concealed treasure and carrying it away, and the bail must be made sufficiently large to guarantee his appearance. In this case he will be required to furnish four sureties besides himself in $10,000 each, that is, jointly and severally in $10,000, a total bond of $10,000. The names of the sureties must be furnished to the Crown officer 48 hours before the bail is accepted, and these sureties, besides making the ordinary affidavit of justification, must attend before the magistrate and submit to an examination as to their means and the property they have and their reliability, and upon satisfactory sureties being furnished then the prisoner may be admitted to bail in the sum mentioned. I require four sureties owing to our experience in this Territory of the unstable character of the population. Cases have occurred where some of our wealthiest mine owners having become surety in civil suits in appeal have before the disposition of the appeal sold out all their property and left the country.

Order for bail.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE TOWNSHEND, C.J., MEAGHER, RUSSELL, LONGLEY, AND LAURENCE, JJ.

THE KING v. SAM CHAK (No. 1).

Appeal—Leave to appeal from judgment on speedy trial—Refusal of trial Judge to reserve certain questions—Certifying all of the evidence and proceedings below—Rev. Cr. Code sec. 1015.

1. On granting leave to appeal to the Court of Appeal under sec. 1015 of the Revised Cr. Code, the Court of Appeal may direct that the Court below shall state a case as if the questions had been reserved.

ARGUED: November 12, 1907.
DECIDED: November 12, 1907.

Motion for leave to appeal based upon the refusal of Daniel D. MacKenzie, Esquire, Judge of the County Court for District No. 7, exercising criminal jurisdiction under Part XVIII. of the Criminal Code, to reserve a question of law on the conviction of the defendant before him, for a violation of The Chinese Immigration Act.

The defendant was convicted before the said Judge, under sec. 7 of the said Act, for that he, the said Sam Chak then being a person of Chinese origin, on the twenty-seventh day of August, 1907, at Gabarous, in the county of Cape Breton, in the Dominion of Canada, did unlawfully violate the provision of sec. 7 of ch. 95 of the Revised Statutes of Canada, 1906, to wit: He then being a person of Chinese origin did enter Canada without paying the tax required by the said section.

Before pleading the prisoner's counsel moved *inter alia* to quash the charge on the ground that the same disclosed no offence known to the law. The trial proceeded and the prisoner was convicted, in the language of the charge, the Judge finding the following facts:—

(*a*) The accused was a person of Chinese origin;

(*b*) That he had entered Canada without the payment of the tax the law requires;

(*c*) And that the prisoner was not any of the persons mentioned in sub-secs. (*a*), (*b*) and (*c*) of sec. 7, ch. 95, R.S. of Can. 1906.

Counsel for the prisoner then moved to reserve certain questions of law for the consideration of the Court of Appeal, which he did, with the exception of the following, which he refused to reserve, to wit:

(1) "Should the prosecution have negatived and proved the exceptions of sec. 7, ch. 95, R.S. Canada, 1906, in the prisoner's case?"

(2) "Was there any evidence to justify the finding that the prisoner was not any of the persons mentioned in sub-secs. (*a*), (*b*) and (*c*) of sec. 7, ch. 95, R.S. Canada, 1906?".

HALIFAX, November 12, 1907.

W. F. O'Connor, for the prisoner, moved for leave to appeal and submitted that on leave being given, the whole case should come up and all the evidence and proceedings should be certified. He referred to secs. 1014, 1015, 1016, 1017 and 1018 of the Criminal Code.

A. Cluney, for the Crown, *contra,* contended that the only order the Court could make was one directing the learned County Court Judge to reserve the questions he had previously refused to reserve.

HALIFAX, November 12, 1907.

The Court delivered an oral judgment granting leave to appeal pursuant to section 1015 of the Criminal Code, and directing the trial Judge to state for the Court of Appeal, a

case as if the questions had been reserved on which a reserved case had been refused by the trial Judge.

Order granting leave to appeal.

Note: *Leave to appeal—Case stated after refusal to reserve—Rev. Cr. Code, secs.* 1015, 1016.

Section 1015 provides for a motion to the Court of Appeal if the trial Court refuses a reserved case upon a question of law.

Any question of law upon which a reserved case might be granted may be the basis of an application for leave to appeal under section 1015, provided an application for a reserved case has been first made thereon to the trial Court and has been refused.

The questions of law may be those "arising either on the trial or on any of the proceedings preliminary, subsequent, or incidental thereto, or arising out of the direction of the Judge." Rev. Cr. Code, sec. 1014(1).

But leave cannot be granted in respect of a question upon which a reserved case has not been asked of the trial Judge. *R.* v. *Carlin* (No. 2), 6 Can. Cr. Cas. 507.

It has been held also that the application for a reserved case must be made *during* the trial and not afterwards, to give the unsuccessful applicant for a reserved case the right to make an application under section 1015 for leave to appeal, although no doubt the trial Judge if he sees fit may reserve a case at a later stage. *R.* v. *Toto,* 8 Can. Cr. Cas. 410.

By section 1016 if leave to appeal is granted a case shall be stated for the opinion of the Court of Appeal "as if the question had been reserved." This would seem to place upon the trial Court a statutory duty to formulate a proper case such as would have been reserved had the trial Judge granted the application for a reserved case instead of refusing it.

If the case so stated does not correctly and fully cover the points of law on which the reserved case was originally asked and on which leave to appeal was granted, the Court of Appeal may send the case back to be amended or re-stated. Rev. Cr. Code, sec. 1017(3). Inferentially this seems to include a jurisdiction in the appellate Court to specify the amendments and so

Note—*Continued.*

Leave to appeal—Case stated after refusal to reserve—Rev. Cr. Code, secs. 1015, 1016.

dictate the precise terms of the "stated case," if an order is made under section 1017 sending the case back to be re-stated.

And while the general practice is to leave the form of the case to be stated to be settled by the Court below when an order has been made granting leave to appeal, the Court of Appeal for Ontario in one case exercised their jurisdiction to require the Court below to state the case in the form set forth in the order. *R.* v. *Coleman* (1898), 2 Can. Cr. Cas. 523, 539.

A seeming defect in the procedure regarding leave to appeal is that no time limit is specified within which judgment must be delivered by the trial tribunal upon the application for a reserved case. The accused frequently has to remain in custody without the option of bail pending a decision, firstly, on the application for a reserved case, and secondly, on the hearing by the Court of Appeal either of the case reserved or of an application for leave to appeal and the proceedings consequent thereto. Section 1015 might well be amended so as to give the appellate Court power to grant leave to appeal not only, as at present, on the "refusal" of a reserved case by the Court below, but on the failure of the Court below to either grant or refuse the application within some reasonable time to be limited for the delivery of judgment upon the motion.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE TOWNSHEND, C.J., MEAGHER, RUSSELL, LONGLEY AND DRYSDALE, JJ.

THE KING v. SAM CHAK (No. 2).

Indictable offences—Chinese Immigration Act, R.S.C. ch. 95*—Entry without paying tax—General clause as to violations of statute—Mere entry not a violation under sec.* 30.

1. For a Chinaman not of the class absolutely prohibited from entering Canada and not guilty of personation or other frauds specified in the Chinese Immigration Act, R.S.C. ch. 95, to enter Canada without pay-

ing the Chinese tax which by that Act is payable on entry, is not an indictable offence.

2. Section 30 of the Chinese Immigration Act which declares that every person who violates any provision thereof for which no special punishment is provided is guilty of an indictable offence, has not the effect of making the entry a "violation" of the Act in the absence of an express enactment prohibiting entry without payment of the tax.

ARGUED: November 25, 1907.
DECIDED: November 30, 1907.

Crown case reserved by His Honour Judge MacKenzie, Judge of the County Court Judges' Criminal Court for District No. 7 (see *The King* v. *Sam Chak* (No. 1) ante p. 495). The following question was added with the consent of the Crown and the Court:—(4) "Was there any evidence to sustain the conviction?"

HALIFAX, N.S., November 25, 1907.

John J. Power, K.C., *W. F. O'Connor* and *Finlay MacDonald*, for the prisoner.

C. B. Smith (Sydney), for the Minister of Justice, and Attorney-General of Nova Scotia, *contra*.

HALIFAX, N.S., November 30, 1907.

TOWNSHEND, C.J.:—The important question to be determined is that first reserved which in substance comes to this:—Is it an indictable offence for a Chinaman to enter Canada without first paying a tax of $500.00?

By ch. 95, sec. 7, R.S.C., "Every person of Chinese origin irrespective of allegiance, shall pay into the Consolidated Revenue Fund of Canada on entering Canada at the port or place of entry a tax of $500, except the following persons, etc."

This defendant has not been shewn to come within the exceptions. The Judge below has found that the defendant did

enter Canada without the payment of this tax and has convicted and sentenced the prisoner as he states under sections 7 and 30.

Section 30 provides that "Every person who violates any provision of this Act for which no special punishment is provided, is guilty of an indictable offence, and liable to a fine not exceeding $500 or to imprisonment for a term not exceeding twelve months."

If the coming into Canada without payment of this tax is made by this Act an indictable offence, then clearly so far as this point is concerned the conviction was right, otherwise it must be quashed.

In this connection it becomes necessary to refer to section 31 which provides that "All suits or actions for the recovery of taxes or penalties under this Act, and all prosecutions for contraventions of this Act which are not herein declared to be indictable offences shall be tried before the recording police magistrate, or stipendiary magistrate having jurisdiction where the cause of action arose, or where the offence was committed."

It will be seen from the above clause and other sections of the Act that there are two classes of offences specified by the Act, that is to say those which are made indictable offences, such as in sections 27 and 28 and those which are not of that character. If not declared in the Act to be indictable offences then the offence is to be tried before the recorder, stipendiary, police or two magistrates. If coming into Canada without paying the tax is an offence at all, it is not declared in the Act to be indictable, and in that view the County Court Judge had no jurisdiction to try the defendant.

I am, however, of opinion that it is not an offence under the Act for a person of Chinese origin to enter Canada before paying the tax. Such a person is liable to pay such tax, and section 31 expressly provides for the mode of collection, and for the tribunal in which action for its collection is to be brought, but there are no words of prohibition in section 7, and no contravention of the Act for which any penalty is fixed for its

violation. There are, it may be noted, several severe penalties imposed upon persons violating different clauses of the Act, such as conductors on railway trains and masters of vessels (sections 13 and 15 and 26-27) and it is evidently to these and other penalties section 21 refers. There are also a certain class of Chinamen absolutely prohibited from entering Canada as in sections 18 and 25, and severe penalties affixed to any person violating those sections which, however, are not declared to be indictable offences, and must, therefore, be prosecuted under section 31. On the other hand certain acts such as wilfully making use of any forged or fraudulent certificate or aiding in doing so makes the person guilty of an indictable offence under section 27, or again under section 28 it is declared to be an indictable offence for Chinese to organize any sort of a Court or tribunal to try offences committed by a Chinese person.

It seems to me, therefore, that indictable offences referred to in the Act must be confined to the above and such other violations for which no special punishment is provided. As already pointed out, a person of Chinese origin is not prohibited from entering Canada, but on doing so by section 7, he is liable to pay the tax. Provision is made for the collection of that tax, but no penalty has been enacted and no language has been used which would justify us in holding that he has committed an offence against the Act.

When we read sections 18 and 25 prohibiting a certain class from entering Canada the distinction is obvious, and indicates that in this legislation there was no intention of making the mere entering of Canada without paying the tax an offence.

The other points reserved do not require to be further dealt with, as the one I have just discussed is in my opinion fatal to the conviction which must be set aside and quashed.

MEAGHER, J.:—I wish it to be understood that I do not assent to the change that was made in the reserved case. I hold that no question can be argued in a reserved case except

such as is stated by the trial Judge, and I was a dissenting Judge, although my dissent is not expressed, in the case of *The Queen* v. *McIntyre*, 3 Can. Cr. Cas. 413.

I have been much impressed by the reasoning of my learned brothers Russell and Drysdale, and have not found time to give as full consideration as I would have liked to give to the questions discussed. It seems to me that we are asked to get at the crime here charged by implication arising from the construction of the statute and I think that where this is the case we should lean against the construction that would make the Act in question a crime. In that I follow the authority of Endlich on Statutes, section 329 and following sections.

[TOWNSHEND, C.J., said with respect to allowing the question to be stated, that it was done because of the fact that the learned County Court Judge had not sent up a stated case as ordered by this Court. He assumed that some explanation would be forthcoming. The counsel were present from Cape Breton and ready to argue the case and with a view to their convenience, the Court has allowed the argument to proceed. It would be well however, to understand in future it was desirable that under no circumstances should the Court hear a cause of this kind unless it was before it in a legal and proper way.]

RUSSELL, J.:—The principal question in this case is whether the neglect or failure of a person of Chinese origin to pay the tax of five hundred dollars provided for by section 7 of chapter 95 R.S.C. 1906, is an indictable offence. The argument for the affirmative is that such failure to pay is a violation of the law and that by section 30 of the chapter every person who violates any provision of the Act for which no special punishment is therein provided is guilty of an indictable offence and liable to the fine or imprisonment therein stated. If the failure to pay the tax is a violation of the law in the sense contended for, it would be a violation in the same sense under section 8 should the controller neglect or fail to deliver to a Chinese immigrant,

who had been permitted to land, the certificate that his tax has been paid. I think this can hardly have been intended. The delivery of such certificate is a duty to be performed by the official, the performance of which might be enforced by mandamus, and the tax is a debt due from the Chinaman for the collection of which express provision is made in section 31 of the Act which cannot have, so far as I can see, any application to any other tax than the one provided for by section 7. In short I cannot see that the provision requiring a Chinaman to pay a tax on entering Canada is put by this section on any different footing from the provision requiring every new business man who comes into an incorporated town after the assessment roll is made up to pay a tax to be ascertained in the manner provided by the Towns Incorporation Act.

The section numbered 27 would it seems to me be superfluous if the failure to pay the tax were an indictable offence punishable under section 30, because it provides almost the same punishment for wilfully evading the payment by personation or by the use of a forged or fraudulent certificate, that the Chinaman on the construction contended for, would be liable to under section 30 in the absence of such forgery or personation. There is a slight difference between the sections it is true. Under section 31 the punishment for personation or forgery is fine $500 or imprisonment for twelve months or both. Under section 30 the general penalty is only a $500 fine or twelve months' imprisonment. It cannot, therefore, be said that section 27 would be absolutely superfluous. Nevertheless, if the legislature did really intend to make an unfortunate Chinaman who might perhaps be a student who had mislaid his certificate, or person enjoying exemption, who could not establish his status, guilty of an indictable offence simply because he had failed to pay his tax I think it was necessary to say so in plainer language. The payment is called a tax and the non-payment of a tax is not ordinarily construed to be a crime.

I doubt if any offence was charged even assuming that the

statute means all that is contended for by the Crown. He was charged with having violated the Act by entering Canada without paying the tax required by the section. Entering Canada without paying the tax does not seem to me to be a violation of the section. He is not required to pay the tax before entering Canada, but on entering Canada. It seems to me that he must be allowed to enter before he is required to pay the tax. The two acts cannot have been intended to be simultaneous. That is to say it is legally possible for the Chinaman to enter Canada without paying the tax and yet pay the tax on entering within the meaning of the statute. If so his entering without paying the tax would not be a violation of the statute. This it may be said is a mere technicality, but I am inclined to think that technicalities quite as narrow as this have often prevailed in criminal cases, and for this reason, among others, I incline to the opinion that the answer to the first question should be in the negative.

LONGLEY, J.:—The first question reserved for review by the learned County Court Judge is:

"Does the accusation sufficiently charge the defendant with an indictable offence under sections 7 and 30 of chapter 95 R.S. of Canada, 1906?"

Upon the determination of this, from my point of view, the whole question rests. It may be accepted, I think, as a recognized principle that penal statutes are to be construed strictly and no crime can be implied from any statutable enactment, the offence must be stated in clear terms. If this is a correct statement, I can find nothing in chapter 95 R.S. Canada which makes it an offence for a Chinaman to enter Canada. It has been made an offence to enter fraudulently by personation and it has been made an offence to certain persons to connive at the admission of large numbers of Chinamen under certain conditions, but I can find no words which make it an offence for a Chinaman to enter Canada. Section 7 declares that

"Every person of Chinese origin, irrespective of allegiance, shall pay into the consolidated revenue of Canada, on entering Canada . . . a tax of $500," excepting certain classes of persons specifically named. I do not think that these words can possibly be construed into the creation of an offence. They must pay the tax; if they do not pay the tax they can be sued for it, and in default of payment execution may be had with all its consequences, but the words of the section neither amount to a prohibition nor can possibly create a crime. If the section said, "persons of Chinese origin are prohibited from entering Canada, unless they have paid a tax," or "any person of Chinese origin entering Canada without paying a tax of $500 shall be guilty of an indictable offence," then it would be easy to found an indictment on this breach of the prohibition; but I can find nothing in the enactment that "Any person of Chinese origin shall, on entering Canada, pay a tax of $500," that savours of crime or could be construed into creating a criminal offence.

The intention of Parliament can only be determined by the language of its enactments, and I do not think it is difficult to conceive that Parliament never intended to make it a crime for a person of Chinese origin, and presumably ignorant of our laws, simply to enter Canada. It is made an offence and reasonably so to evade the tax by personation, or even to aid and abet another in doing so, but no words can be found in the whole Act which suggest that it is a crime for a person of Chinese origin to simply set foot on the soil of Canada. He must pay his tax, and he is liable to all the consequences of non-payment in his person and estate, but that is quite different from making mere entry an indictable offence.

The Customs Act is full of prohibitions and many of the prohibited things are indictable, but as before said clause 7 is in no sense a prohibitive clause and creates no offence.

In my view, therefore, the defendant was charged with no crime whatever, and his conviction entirely unwarranted. No crime in my view was charged against him and no crime proved. He should, therefore, be discharged.

Having been able to reach this conclusion on the first and principal point reserved, it is not necessary for me to deal with the other grounds raised on behalf of the accused.

DRYSDALE, J. (dissenting):—In this case we are called upon to construe the Act respecting and restricting Chinese immigration.

The defendant was tried before the County Court Judge for District No. 7, for violating the provisions of the above mentioned Act in that he, defendant, being a person of Chinese origin did on the 27th of August, 1907, at Gabarus, in the County of Cape Breton, unlawfully violate the provisions of section 7 of said Act by entering Canada without paying the tax required by such section. The learned County Court Judge convicted the accused, but reserved and stated the following questions for the consideration of this Court:—

"1. Does the accusation sufficiently charge the defendant with an indictable offence under sections 7 and 30 of chapter 95 of the Revised Statutes of Canada, 1906?

"2. Was the evidence offered to shew the facts surrounding the arrest and preliminary hearing of the prisoner and the objections taken before the magistrate properly excluded?

"3. And do irregularities before a justice on the preliminary enquiry affect the jurisdiction of the County Court after the prisoner has elected to be tried by a Judge of the County Court without a jury?"

The main question raised before us herein arises under question No. 1.

It is contended by counsel for the accused that it is not a violation of the Act contemplated by section 30 for a person of Chinese origin to enter Canada without paying the tax imposed by section 7, that this last named section merely imposes a tax that may be sued for and collected by civil procedure.

I am unable to accept this interpretation—the Act is one restricting immigration. It limits the number of immigrants

coming by vessels, prohibits absolutely the landing of certain classes, and as to those the landing of which is not prohibited, it enacts that each such person shall pay a tax of $500 on entering Canada. Then the Act imposes various penalties for specific infractions and finally by section 30 provides that every person violating any provision of the Acts for which no special punishment is therein provided is guilty of an indictable offence.

In my opinion the wilful evasion of the payment of money imposed by section 7 as occurred in this case by secret landing at a remote point in the island of Cape Breton must be held a violation of a provision of the Act contemplated by section 30 and is an indictable offence. There are many specific offences dealt with. The wilfully evading the payment of the tax by personation or by the use of forged or fraudulent certificates is specially provided for. Then follows the section relied on, viz. section 30, which enacts that every person violating any provision of the Act for which no special punishment is provided, is guilty of an indictable offence, and I am of the opinion that wilfully evading the payment of the tax on entering Canada is just such a violation of the main provision of the Act as was contemplated by the section last mentioned.

It would it seems to me, lead to a strange result and one surely never contemplated were we to hold, notwithstanding the drastic provisions against carriers and others aiding or permitting entry of persons of Chinese origin without payment of the tax, and notwithstanding the various other stringent provisions in the Act, all enacted with a view to prevent the entry without payment of such tax, yet that such persons themselves are to be at liberty to come into Canada as of right without payment, and the only recourse be a suit to recover the money.

I cannot persuade myself to adopt such a conclusion. It seems to me the main provision of the Act is section 7, and when it enacts that every person of Chinese origin shall pay on entering Canada at the port or place of entry a tax of $500. Com-

pliance with this is compulsory and any wilful evasion of the duty imposed thereby must be held to be a violation of the main provision of the Act, and consequently indictable under section 30. This last named section is clear in its terms and expressly makes every person who violates any provision of the Act for which no special punishment is provided guilty of an indictable offence. And the point was raised under this section, first against the sufficiency of the charge. It was contended that the Crown must negative the exemptions contained in sub-sections (*a*) (*b*) and (*c*) of sec. 7, both in its allegation or charge and in its proof. It was argued that these exemptions were in the nature of exceptions in the enacting clause and must be negatived. I am of opinion that it was not incumbent on the Crown either to allege or prove that the accused did not come within the class of persons exempted from the operation of section 7. The clause is an enactment dealing first with all persons of Chinese origin and the sub-sections provide for a class who are exempt from its operations. These exemptions or exemptions by way of exception do not occur in the description of the offence but are really in the nature of a proviso. They do not alter the offence but merely state what persons are to take advantage of the exemption and in my view this is a matter of defence. The authorities dealing with this question are collected in *The Queen* v. *Strauss*, 1 Can. Cr. Cas. 105. Under questions numbered 2 and 3 it was sought to raise the question of the validity of the arrest of the accused in the first instance when he was taken before the magistrate. When the accused was committed under a preliminary examination and afterwards elected to be tried before the County Court Judge, in my view it was not open to him in such Court to question the legality of his arrest.

In this case I would answer the first two questions in the affirmative and the third in the negative.

In my opinion the conviction ought to be affirmed.

Conviction quashed.

[JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.]

BEFORE LORD ROBERTSON, LORD COLLINS, SIR ARTHUR WILSON, SIR HENRI ELZEAR TASCHEREAU AND SIR ALFRED WILLS.

THE KING v. TOWNSEND (No. 4).

TOWNSEND v. COX.

Certiorari—Leave to appeal in criminal matter—Canada Temperance Act —Search warrant for liquors—Regularity—Issuing before prosecution for illegally keeping for sale—Canada Temperance Act, R.S.C. 1906, *ch.* 152, *sec.* 136—*Revised Criminal Code* 1906, *sec.* 1025.

1. A search warrant for liquors may be issued under the Canada Temperance Act without first laying a charge against the custodian of the liquors for keeping them for sale.
2. *Quære*, whether the Judicial Committee may not grant special leave to appeal from a Canadian Court in a criminal matter notwithstanding sec. 1025 of the Revised Cr. Code 1906 (sec. 751 of the Code of 1892), but such leave will not be granted unless the judgment below is attended with sufficient doubt to justify the granting of special leave.

ARGUED: July 10 and 11, 1907.
DECIDED: July 31, 1907.

Consolidated appeals from an order of the Supreme Court of Nova Scotia (April 11, 1906), dismissing the appellant's application for writs of certiorari to remove into the said Court the search warrant mentioned in their Lordships' judgment, and dated September 23, 1905, and also the destruction order dated September 26.

The decision appealed from is reported *sub nom. R.* v. *Townsend* (No. 2), 11 Can. Cr. Cas. 115.

At the time the warrant was issued no information had been sworn charging the appellant with an offence against the Canada Temperance Act (R.S.C. 1886, ch. 106, as amended by 51 Vict. ch. 34, and 4 Edw. VII. ch. 41).

A question arose as to the power to issue a search warrant

under the Act before prosecution brought. On this point it had been held prior to the Act in the Courts of Ontario and Nova Scotia that there was no such power. The issue of a warrant was a proceeding in aid, and not an original proceeding under the Act: see *Reg.* v. *Doyle* (1886), 12 Ont. Rep. 347; *Gallihew* v. *Peterson* (1887), 20 Nov. Sc. R. 222.

The Supreme Court refused the writs prayed by the appellant, but gave leave to appeal to His Majesty in Council. The respondent applied to set aside this leave, and the appellant applied for special leave in the event of its being held that the leave given was ultra vires.

LONDON, ENG., July 31, 1906.

Newcombe, K.C., moved to quash the appeals. The terms of the order providing for appeals from the Supreme Court of Nova Scotia are contained in Her Majesty's Order-in-Council of the 20th of March, 1863, which provides as follows:—

> "Any person or persons may appeal to His Majesty in his Privy Council from any final judgment, decree, order or sentence of the said Supreme Court of the Province of Nova Scotia as a Court of civil judicature or as a Court of revenue or escheat in such manner within such time and under and subject to such rules, regulations and limitations as are hereinafter mentioned; that is to say: In case any such judgment, decree, order or sentence shall be given or pronounced for, or in respect of any sum or matter at issue above the amount or value of £300 sterling, or in case such judgment, decree, order or sentence shall involve directly or indirectly any claim, demand or question to or respecting property or any civil right amounting to or of the value of £300 sterling, the person or persons feeling aggrieved by any such judgment, decree, order or sentence, may within fourteen days next after the same shall have been pronounced, made or given apply to the said Court

by motion or petition for leave to appeal therefrom to His Majesty in his Privy Council."

The applications for certiorari were heard before the Court consisting of four Judges. Three of the Judges were of opinion not to allow the certiorari; the Chief Justice dissented; and by a further provision of this rule, if the Court is not sitting, a Judge of the Court may allow the appeal to the judicial committee. The Court at a subsequent date not being in session, the Chief Justice allowed these appeals which we are now asking your Lordships to set aside.

I submit that this is a criminal proceeding, and that the Supreme Court of Nova Scotia in hearing this application for a certiorari was sitting as a Court of criminal jurisdiction and not as a Court of civil judicature. They were presiding under the Crown rules authorized by the Dominion statute, and the proceeding being in itself essentially a criminal proceeding, the Court was sitting in the exercise of its criminal jurisdiction. Therefore, the case does not come within the enabling words of the rule. Further than that, there is section 751 of the Criminal Code of Canada, which is chapter 29 of the Acts of 1892, which provides as follows. "Notwithstanding any royal prerogative or anything contained in the Interpretation Act or in the Supreme and Exchequer Courts Act no appeal shall be brought in any criminal case from any judgment or order of any Court in Canada to any Court of Appeal or authority by which in the United Kingdom appeals or petitions to his Majesty-in-Council may be heard."

In the case of *Cushing* v. *Dupuy*, 5 App. Cas. 409, 1 Cartwright 259, words less comprehensive than those were considered with reference to the effect of the statute in taking away an appeal provided for by the rule.

The provision of the Code, even if the appeal would otherwise fall within the rule, has the effect of repealing the rule to that extent, so that no appeal may be allowed in a criminal matter.

I refer to the case of *The Queen* v. *Fletcher*, 2 Q.B.D. 46, in which it was held that a certiorari to bring up a criminal proceeding is itself a criminal proceeding, and the judgment upon such an application is a criminal matter. To the like effect is *Ex parte Schofield*, [1891] 2 Queen's Bench Division, page 428, and *The Queen* v. *Tyler*, [1891] 2 Q.B.D., page 588. It is alleged and claimed that the liquors destroyed by virtue of the destruction order were of the value of about $4,000, but these orders which are the subject of this appeal do not involve any sum or matter at issue above the amount of £300 sterling. They do not involve any sort of amount of property or value at all. What would have been the effect of the judgment if the certiorari had been allowed? The effect would have been to direct that these proceedings should be brought up for review by the Supreme Court. What would have happened afterwards was an apparently open question. Nothing could have been recovered in this proceeding. The only question is as to the regularity of these proceedings, and it was held unanimously by the Supreme Court of Canada, in the case of *Sleeth* v. *Hurlburt* (1896), 25 Can. S.C.R. 630, 3 Can. Cr. Cas. 197, that the adjudication of the Court in a case of this kind upon an application for certiorari to bring up proceedings by which property might be taken had no effect whatever in determining the status of the property—that the judgment had merely the effect of determining the regularity of the proceedings.

As to the application to bring up the destruction order, the same argument applies.

Mr. Rowlatt:—If the Court was sitting as a Court of criminal judicature, and it was sitting with reference to certiorari in a criminal matter, I ask that I should obtain my appeal by way of special leave. Both parties were heard before the Chief Justice—it was not *ex parte*. In *Wentworth* v. *Mathieu*, [1900] the Court in certiorari quashed some of these orders in the Supreme Court of Quebec, and the Judicial Committee gave special leave to appeal, and the orders quashing the convictions were set aside and the convictions were restored.

Wentworth v. *Mathieu*, [1900] A.C. 212, 3 Can. Cr. Cas. 429. In the section of the Canada Temperance Act in question, as it is reproduced in an amending Act, the words "before one of the justices of the peace before whom any prosecution . . . is brought" are omitted. I think I can satisfy your Lordships that they are omitted because the Act has been re-cast, and for other reasons it is unnecessary that those words which occur in the first Act should appear here. I contend that the amending Act does not alter the law as held by the Court below.

Under those circumstances I would ask your Lordships to allow the leave to appeal, and to consolidate the appeals. I submit to your Lordships that it is perhaps fair that your Lordships should give leave in this case.

LORD MACNAGHTEN:—Have you anything to say to that, Mr. Newcombe? There seems to be a question for argument.

Mr. Newcombe:—Might I say a word, my Lord? In view of the way your Lordships have been disposing of these applications for leave to appeal, this application is absolutely without any merits.

LORD MACNAGHTEN:—We cannot go into the merits now.

Mr. Newcombe:—My learned friend is basing his application upon this, that there is a question to be argued. The facts as appearing upon the record are these. Search was made under the proceeding now in question and the liquor was found; it was brought before the magistrate; the defendant was summoned for illegally keeping that liquor for sale, and was duly convicted, and a penalty of $50 imposed. The statute provides that, if the liquor is found, as a further penalty an order may go for the destruction of the liquor, and so the liquor having been found, the further order was made. These proceedings took place in the presence of the parties. He appealed to the County Court and his appeal was dismissed. There is no application to bring up the conviction on the merits, and the only ground is a technical ground with regard to the regularity of the proceedings for the search warrant and the destruction

order. In the Supreme Court of Nova Scotia the only question which was argued was first, that this search warrant should not have been issued before the information was laid for the offence, and, secondly, that the information was irregular in form in that it did not set out perfectly or as was contended it should have set out, the particulars of the grounds of suspicion upon which the information was laid.

It is admitted that the offence was committed. There is no appeal or request for appeal upon that. The offence was committed, and the question is merely a question as to the regularity of this proceeding. That being so, I submit, my Lords, that it falls within the principle upon which your Lordships have dismissed so many applications for special leave to appeal—because that is all we are dealing with now—and I suppose your Lordships would not deal with it probably more favourably because the Chief Justice, in the absence of any authority, has seen fit to grant leave under the rules. In *Dillet's Case*, 12 App. Cas. at page 466, Lord Blackburn says:—

> "It may be assumed that the Queen has authority"—this is quoting from *The Falkland Islands Company* v. *The Queen*—"by virtue of her prerogative to review the decisions of all colonial Courts whether the proceedings be of a civil or criminal character, unless Her Majesty has parted with such authority. But the inconvenience of entertaining such appeals in cases of a strictly criminal nature is so great, the obstruction which it would offer to the administration of justice in the colonies is so obvious, that it is very rarely that applications to this Board similar to the present have been attended by success."

And Lord Watson, on the following page, says:—

> "Such appeals are of rare occurrence; because the rule has been repeatedly laid down, and has been invariably followed, that Her Majesty will not review or interfere with the course of criminal proceedings, unless it is shewn that, by a disregard of the forms of

legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done."

It would be necessary for your Lordships to determine, in order to allow special leave in a case of this kind, that the section of the Criminal Code which I have read is *ultra vires* of the Parliament of Canada.

LORD MACNAGHTEN:—Surely it would not be necessary to go so far as that, would it?

Mr. Newcombe:—It says that, notwithstanding the prerogative of Her Majesty, no appeal shall be allowed.

SIR ARTHUR WILSON:—Surely that means no appeal so far as the matter lies within the jurisdiction of the Canadian Legislature. No one in Canada can grant any leave to appeal in such a case. They cannot legislate as to what the King in Council can do.

Mr. Newcombe:—In the case of *Cushing* v. *Dupuy*, to which I have referred, it was said that it was not necessary to determine it. It was left an open question as to whether the Parliament of Canada had authority to take away the prerogative right of appeal. The statute in that case did not take it away —it was left an open question. But I submit if this section has not the effect which I claim for it, it has no effect. There is no Court in Canada, with respect to which these words "notwithstanding any royal prerogative" would be applicable. The intention of that section is to do away with criminal appeals in all cases, and I submit it was perfectly competent to the Parliament of Canada to do so. It has been held in respect of matters relating to peace, order, and good government of Canada that the Parliament of Canada has the utmost latitude of discretion in its legislation—that its powers as to Canada are equally great with those of the Imperial Parliament, and in enacting that these appeals shall be taken away, I submit it is merely executing the powers conferred upon it by the British North America Act.

Mr. Rowlatt:—The appeal did take place in *Wentworth* v. *Mathieu*, [1900] A.C. 212, 3 Can. Cr. Cas. 429, since that section has been law.

The question is whether the destruction of $4,000 worth of property was lawful, and if it was unlawful, we should have a remedy.

LORD MACNAGHTEN:—It is only with a view to further proceedings.

Mr. Rowlatt:—There are further proceedings no doubt.

LORD MACNAGHTEN:—Their Lordships have considered this matter. This application raises a somewhat important question, which their Lordships could not decide on an application of this sort. They, therefore, think it better not to make any order upon this petition at present, but to allow it to stand over until the hearing of the appeal. Of course, Mr. Newcombe, you will then be at liberty to raise any point you think desirable.

With regard to Mr. Rowlatt's application for special leave to appeal, their Lordships do not propose to grant special leave at present, but the application for special leave can also be renewed at the hearing; and, if their Lordships, or the Board who then hear the appeal, think that special leave ought to be granted, an order to that effect can then be made. So that we decide nothing at present.

Mr. Rowlatt:—May the appeals be consolidated?

LORD MACNAGHTEN:—Yes, I think the appeals ought to be consolidated. You have no objection, Mr. Newcombe, to that?

Mr. Newcombe:—No, my Lord, none whatever to that.

LONDON, ENG., July 10 and 11, 1907.

Sir R. Finlay, K.C. and *Rowlatt* (*J. J. Power*, K.C. (Halifax) with them), for the appellants, contended that the judgment of the Supreme Court should be reversed. They referred to the Canada Temperance Act, secs. 99-105, and to the amending Act, 51 Vict. ch. 34, secs. 6-8; to secs. 108 and 109 of the former Act,

as amended by secs. 10 and 11 of 51 Vict. ch. 34; and to the construction put upon the sections of the Act of 1886 in *Gallihew* v. *Peterson* (1887), 20 Nov. Sc. R. 222; *Reg.* v. *Doyle* (1886), 12 Ont. Rep. 347; *Reg* v. *Walker* (1887), 13 Ont. Rep. 83. They contended that 51 Vict. ch. 34 did not vary the Act of 1886 for the purpose of the present question, but on its true construction and effect re-enacted its provisions as judically interpreted. By the true construction of either Act a search warrant can only be issued by a judicial authority before whom a prosecution has been commenced. Otherwise goods seized under a warrant might never come before a Court having authority to deal with them. The Temperance Act, 1906, ch. 32, secs. 131, 133 and 136, was also mentioned, and *Wentworth* v. *Mathieu,* [1900] A.C. 212, 3 Can. Cr. Cas. 429, referred to.

Newcombe, K.C., and *Frank Russell,* for the respondents, contended that the Supreme Court had no power to give leave to appeal. On the merits they relied upon sec. 10 of the Act of 1888, which repealed sec. 108 of the former Act, authorizing the issue of the search warrant, and re-enacted it in a different form, leaving out the words on which the decisions quoted by the appellant turned, viz., "before whom any prosecution for an offence against the provisions of the second part of this Act is brought." They contended that such omission was deliberately made with a view to those decisions, and that since the Act of 1888 it is lawful to issue a search warrant although no prosecution is pending. Certiorari does not lie to bring up intermediate proceedings in a case where a final conviction has been made which the appellant does not include in his application. They referred to *Reg.* v. *Fletcher* (1876), 2 Q.B.D. 43; *R.* v. *Roddy* (1877), 41 U.C.Q.B. 291, 302; *R.* v. *Sainsbury* (1791), 4 T.R. 451, 457; *Reg.* v. *McCrae* (1898), 28 Ont. Rep. 569; *R.* v. *Gillyard* (1848), 12 Q.B. 527; to the English Licensing Act (37 & 38 Vict. ch. 49), sec. 17; and to *Gill* v. *Bright* (1871), 41 L.J. (M.C.) 22. Special leave to appeal ought not to be granted in

this case, and in its absence the appeals are incompetent: *In re Dillett* (1887), 12 App. Cas. 459; *Ex parte Deeming*, [1892] A.C. 422; *Ex parte Kops*, [1894] A.C. 652; *Ex parte Carew*, [1897] A.C. 719; Safford and Wheeler's Privy Council Practice, pp. 756, 757; Canadian Criminal Code, 1892, sec. 751.

Rowlatt replied.

LONDON, ENG., July 31, 1907.

The judgment of their Lordships was delivered by

LORD COLLINS:—These cases come before this Board under the following circumstances:—

The appellant is an hotel keeper at Kentville, Nova Scotia, where the Canada Temperance Act, 1888 (51 Vict. ch. 34), was at all material times in force.

On September 23, 1905, in consequence of an information laid before two justices by the respondent under that Act, a search warrant was issued to search the said hotel and premises for intoxicating liquor suspected to be kept for sale thereon. On September 25, the search warrant was duly executed, and large quantities of intoxicating liquor were found thereon and brought before the justices to be dealt with according to law. On the same day the respondent laid an information before two justices, charging the appellant with unlawfully keeping for sale on September 25, at Kentville, aforesaid, intoxicating liquor contrary to the provisions of the Canada Temperance Act, and issued a summons, calling on the appellant to appear on September 26, to answer such last-mentioned information. On September 26, the appellant was tried and convicted of having unlawfully kept for sale intoxicating liquor on September 25 in his said hotel and premises, and was fined accordingly, and on the same day the said two justices, having duly convicted the appellant as aforesaid, declared the said liquor and the vessels in which the same was kept to be forfeited to His Majesty, and ordered the destruction thereof. The appellant applied to

the Supreme Court of Nova Scotia for a writ of certiorari to remove into the said Court the record of search warrant of September 23, and also for a like writ to remove into the same Court the record or order for destruction of liquor of September 26, aforesaid. The Supreme Court dismissed each application, Weatherbe, C.J., dissenting. Subsequently leave was obtained from the Supreme Court to appeal to His Majesty in Council against each of the said orders. The respondent thereupon petitioned His Majesty in Council that the orders admitting the appeals might be set aside. On the hearing of these petitions their Lordships directed them to stand over till the hearing of the appeals, with an intimation that, if at the hearing there should appear to be substantial doubt as to whether the appeals were or were not properly brought without special leave, and if their Lordships should then be of opinion that it was a case for granting special leave, they would be prepared to order accordingly.

On July 10 the appeals came on before their Lordships, who decided to hear the cases on the footing that the appellant had lodged petitions for special leave to appeal. Accordingly the facts and arguments were fully discussed before their Lordships. In the judgment of this Board delivered by Lord Watson in *La Cité de Montréal* v. *Les Ecclésiastiques du Séminaire de St. Sulpice de Montréal* (1889), 14 App. Cas. 660, at p. 662, there is the following passage: "A case may be of a substantial character, may involve matter of great public interest, and may raise an important question of law, and yet the judgment from which leave to appeal is sought may appear to be plainly right, or at least to be unattended with sufficient doubt to justify their Lordships in advising Her Majesty to grant leave to appeal."

Without venturing to predicate of these appeals any of the propositions in the earlier part of the sentence, their Lordships are clearly of opinion that the last part of the sentence is directly applicable to them. The chief ground of appeal to the Supreme Court was that with respect to the search warrant certain cases

had decided that such a warrant could only issue as ancillary to a prosecution already commenced. It was undoubtedly true that certain cases had so decided, but in the following year the Legislature intervened and amended the Act under which the search warrants in those cases had been issued by striking out the words on which the Courts had founded their opinion that the commencement of a prosecution was a condition precedent to the issue of a search warrant, and it is under the amended Act that the proceedings now in question took place. Their Lordships cannot doubt that the Legislature by this simple and artistic amendment intended to make it impossible to ground a similar contention on the amended sections. Without, therefore, inquiring further into the reasons which have been urged against the granting of special leave in these cases, their Lordships are content to rest their decision upon the authority above cited.

Their Lordships are therefore of opinion that these are not cases in which they would have been disposed to advise His Majesty to grant special leave to appeal, and they will accordingly humbly advise His Majesty to dismiss the appeals. The appellant will pay the costs of the appeals, including the costs of the respondent's above-mentioned interlocutory petitions.

Appeals dismissed.

Note: *Appeals to the Privy Council in criminal matters—Revised Cr. Code, sec.* 1025.

Section 1025 of the Revised Criminal Code 1906, is as follows:—

"Notwithstanding any royal prerogative, or anything contained in the Interpretation Act or in the Supreme Court Act, no appeal shall be brought in any criminal case from any judgment or order of any Court in Canada to any Court of Appeal or authority, by which in the United Kingdom appeals or petitions to His Majesty in Council may be heard."

This section was contained in the Criminal Code of 1892 as sec. 751, which was in turn taken from the Dominion Statute 51 Vict. ch. 43, sec. 1.

Note—*Continued.*

Appeals to the Privy Council in criminal matters—Revised Cr. Code, sec. 1025.

As shewn in the argument of the applications for special leave in *Townsend's Case* it is a debatable question whether the Canadian Parliament has authority to curtail the prerogative of granting special leave of appeal to the King in Council which is exercised by the Judicial Committee.

The section may not be wholly *ultra vires* for its true effect and intent may be merely to dispense with appeals as of right and not as of grace, in those criminal cases to which it applies.

The general rule is laid down by Anson (Law of the Constitution II. 445) as follows: "The Queen has authority by virtue of the prerogative to review the decisions of all colonial Courts, whether the proceedings be of a civil or criminal nature, unless Her Majesty has parted with such authority."

The recent case of *Webb* v. *Outrim*, [1907] A.C. 81, before the Judicial Committee of the Privy Council, was an appeal from the Supreme Court of Victoria, Australia, upon a question of the validity of a State income tax law as regards federal officials. It was claimed on behalf of the appellant that there was a right of appeal to the Privy Council prior to the Imperial statute which created the Australian Commonwealth and that the latter statute did not affect such right nor empower the Federal Parliament of Australia to pass a statute taking away the right of appeal. The appeal was allowed by the Judicial Committee.

The Earl of Halsbury in delivering their judgment thus dealt with the objection as to jurisdiction:—

> "With respect to the objection urged—both as a preliminary objection and one of substance—to the hearing of the appeal at all by this Board, their Lordships are disposed to adopt the reasoning of the Supreme Court in giving leave to appeal. The only basis upon which the objection can be suggested to be founded is the Commonwealth Act, and no direct authority under that Act has been shewn. If, as Hodges, J., says, there is no direct authority, it is not reasonable to suppose that the British Parliament ever intended so important an end to be attained by indirect or circuitous methods. 'In such an important matter direct authority would be given, or none at all, and none is direct-

Note—*Continued.*

Appeals to the Privy Council in criminal matters—Revised Cr. Code, sec. 1025.

ly given.' The learned Judge continues: 'I may further observe that the appeal to the King in Council was, as a matter of history, one of the matters that was prominently before the British Legislature at the time it passed the Commonwealth Constitution Act, and the extent to which a citizen's chance of getting a hearing from that august tribunal is affected is shewn in sections 73 and 74. Neither of these sections authorizes the Commonwealth Parliament to take away the right in such a case as the one I am now considering, nor does any other section directly give such authority. And I think I might content myself by saying those two sections deal with this subject and do not authorize the Commonwealth Parliament to deprive the subject of this right of appeal against a judgment of the State Court, and no other section gives such authority.'

Their Lordships also concur in what the same learned Judge says at the end of his judgment: 'If the Federal Legislature had passed an act which said that hereafter there shall be no right of appeal to the King in Council from a decision of the Supreme Court of Victoria in any of the following matters, and had set out a number of matters, including that now under consideration, I should have felt no doubt that such an Act was outside the power of that Federal Legislature. And, in my opinion, it is outside their power to do that very thing in a roundabout way.'"

It may further be noted that the context of the present section 1025 both in the Revised Code and in the Code of 1892 affords room for doubt whether the term "in any criminal case" is not to be limited so far as section 1025 is concerned to cases in which an indictable offence is charged. The limited appeal to the Supreme Court of Canada which is dealt with by the preceding section (1024) is given to a person "convicted of any indictable offence."

Section 1013 provides for an appeal from the verdict or judgment of any Court or Judge having jurisdiction in criminal cases or if a magistrate proceeding under section 777, "on the trial of any person *for an indictable offence.*"

Futhermore none of the other sections under the same gen-

Note—*Continued.*

Appeals to the Privy Council in criminal matters—Revised Cr. Code, sec. 1025.

eral heading of "Sentence, arrest of judgment and appeal" which precedes section 1004, appear to have any application to matters of certiorari from a summary conviction.

The scheme of the Code which is being worked out in sections 1004 to 1025 inclusive as regards appeals is to substitute for the former process by writ of error, the appeal by way of case reserved or by special leave if a reserved case is refused.

Section 1014 declares that no proceeding in error shall be taken "in any criminal case." Evidently the phrase "criminal case" here relates to cases in which proceedings in error were formerly permitted, and a writ of error did not lie in summary conviction matters. See *R.* v. *Powell* (1861) 21 U.C. Q.B. 215.

Special leave was granted by the Privy Council in *Wentworth* v. *Mathieu* (1900) 3 Can. Cr. Cas. 429, and so far as appearing without any question being raised as to section 1025 (then section 751) of the Code being a bar, but the case dealt with summary convictions under the Temperance Act of 1864 and not with an indictable offence.

As to the Royal assent and the authority of the Governors-General of Canada, reference may be had to Lord Lansdowne's Commissions in Canada Sessional Papers (1884), volume 17, No. 11, paper 77, and to the Letters Patent constituting the office of Governor-General, Canada Sessions Papers (1879), vol. 12, No. 8, paper 14.

The particulars of the letters patent of 1905 and the Instructions to the Governor-General from the British Government will be found with the Imperial Orders in Council printed with the Canada Statutes of 1907, pages lv. and lviii.

The latter Instructions specially refer, in paragraph V. to the exercise of the pardoning power, and state its limitations.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE ANGLIN, J., IN CHAMBERS.

THE KING v. FARRELL.

Habeas corpus—Certiorari in aid—Ontario Habeas Corpus Act—Duty of Court to examine depositions notwithstanding return of conviction regular on its face—Clerical error in date of commitment—Second offence—Proving prior conviction—Supplementing record of proceeding by affidavit—Defendant's right to make "full answer and defence" —Refusal of adjournment on amendment of charge—Liquor License Act, R.S.O. 1897, *ch.* 245—*Revised Cr. Code* (1906), *secs.* 683, 715, 721.

1. The Ontario Habeas Corpus Act, R.S.O. 1897, ch. 83, sec. 5, makes it necessary, where a certiorari in aid has been granted, to consider the depositions and proceedings returned in order to ascertain whether there is any evidence to sustain the conviction, even where the conviction is regular in form.
2. A clerical error in dating the warrant of commitment as of the day preceding the date of the information is a matter for amendment and is not a ground for discharge where a conviction regular in form is returned.
3. Where the depositions and record of proceedings before the magistrate for a second offence under the Ontario Liquor License Act do not disclose any evidence or admission of a prior conviction, leave will not be given on habeas corpus to supplement the proof by affidavits shewing that such evidence was in fact given or admission made.
4. Where the accused was summoned for the day following the service of the summons and the charge was then amended as to the date of the offence, the accused was entitled to an adjournment without being put on terms of paying the costs of the day, and the refusal of same was a denial of his right to make full answer and defence (Revised Code, sec. 715).

ARGUED: November 5, 1907.
DECIDED: November 13, 1907.

MOTION by the defendant upon returns to writs of *habeas corpus* and *certiorari* in aid for his discharge from custody in the common

gaol of the county of Peel, under a conviction by Robert Crawford, police magistrate for the town of Brampton, for selling liquor without a license after a previous conviction for a similar offence. The defendant was sentenced to four months' imprisonment as for a second offence. He based his claim for discharge upon the following grounds:—

(1) That the police magistrate of Brampton had no jurisdiction, the offence being charged as having been committed in the township of Toronto, and without the limits of the town of Brampton.

(2) That the warrant of commitment under which the prisoner is held bears date the 7th October, 1907, whereas the information upon which the conviction is based was laid upon the 8th October, and the conviction bears date the 9th October.

(3) That upon the papers returned there appears no evidence of a former conviction.

(4) That the inquiry as to a former conviction took place, if at all, before the defendant had been found guilty upon the then pending charge.

(5) That he was not allowed a fair or reasonable opportunity to make his defence.

TORONTO, November 5, 1907.

T. J. Blain, for the defendant.

J. R. Cartwright, K.C., for the Attorney-General.

TORONTO, November 13, 1907.

ANGLIN, J.:—The following facts are established by the evidence before me:—

The information as originally laid appears to have charged offences committed in the township of Toronto on the 1st and 7th days of October. The summons served upon the defendant in the afternoon of the 8th October required him to answer on the next day a charge laid in these terms. Upon being served, the defendant immediately telegraphed his solicitor, Mr. Blain, notifying him that

he wished him to attend at the Brampton court house on the following afternoon. In reply he received a telegram requesting him to meet Mr. Blain at Brampton in the morning. He did so, and, having then for the first time informed Mr. Blain of the nature of the charge laid against him, learned that it would be impossible for Mr. Blain to attend in the afternoon, owing to a previous engagement requiring his presence in the city of Toronto. Mr. Blain explained to the defendant the steps which it would be necessary to take to properly present his defence, including having an analysis made of the beverages sold by him, in order to shew that the same were non-intoxicating, the defendant contending that he had sold only local option beer, which he claimed to be non-intoxicating. Mr. Blain and the defendant then attended upon the police magistrate, and Mr. Blain explained to him the reasons why he would be unable to be present at the trial in the afternoon, and why, in any event, he could not be prepared to proceed with the defence at the time appointed, and requested an adjournment to afford an opportunity of preparing a proper defence. Mr. Blain urged the magistrate to telegraph or telephone to Mr. Ayearst, the provincial inspector, who was prosecuting, notifying him that the proceedings could not go on at the time appointed, and would be adjourned. The magistrate refused to communicate with Mr. Ayearst, and declined to consent to any adjournment. Being obliged to leave town immediately, Mr. Blain thereupon gave to the defendant a letter, addressed to Mr. Ayearst, explaining to him the position and asking him in fairness to agree to an adjournment, expressing his willingness to attend at any future date which might suit the convenience of the prosecutor and the magistrate.

The defendant attended pursuant to the summons served upon him at the court house in Brampton at two o'clock in the afternoon of the 9th October, 1907. He delivered Mr. Blain's letter to Mr. Ayearst. He again applied for an adjournment. The magistrate refused, and, in answer to the explanation of the defendant that he had no lawyer to take his case or advise him, the magistrate stated that he would get a lawyer for him. He then left the Bench, and on his return informed the defendant that Mr. Morphy, a solicitor

of Brampton, would be present in a few minutes and that he could have Mr. Morphy act for him.

When Mr. Morphy appeared, the defendant explained to him his desire for adjournment. Mr. Morphy pressed for an adjournment, which the magistrate again refused; but, upon Mr. Morphy persisting in his demand, the magistrate offered to grant an adjournment upon payment of costs of the day, which he said would be about $10. The magistrate says in his affidavit that the defendant proceeded with the case rather than pay this sum of $10. The defendant, on the contrary, says that he expressed his willingness to pay the $10 rather than proceed with the trial on that day, but that the magistrate, notwithstanding his readiness to pay, then refused to adjourn the case, and directed the trial to proceed.

Mr. Morphy, for the defendant, took exception to the information upon which the magistrate was proceeding, which, it appears, as then framed, charged that the defendant had committed the offence of selling liquor without a license "between the 1st and 8th days of October, 1907." Thereupon the information was changed so as to charge the defendant with selling intoxicating liquor without license on the 2nd day of October, 1907. Notwithstanding this amendment, upon the making of which the defendant again pressed for an adjournment, representing that with the date thus fixed he could produce a witness who could give material evidence on his behalf, the magistrate refused to adjourn, and proceeded with the trial.

The evidence taken was sufficient to warrant a conviction for selling liquor without a license. The notes, however, as returned, disclose nothing in regard to any prior conviction. The magistrate makes affidavit that after he had found the defendant guilty he asked him whether he had been previously convicted of a similar offence, to wit, on the 30th March, 1907, and that the defendant then admitted that he had been previously so convicted. The magistrate adds that this admission was not reduced to writing, and was inadvertently omitted from the evidence. The defendant, however, says that "immediately after I gave my evidence and before any-

thing further was done by the magistrate, I was asked by Mr. Crawford, the police magistrate, if I had been previously convicted, no time being mentioned as to when I was convicted, and I denied having been formerly convicted, whereupon John D. Orr, license inspector for the county of Peel, was called as a witness and sworn, and some questions asked him, and I was then asked what I had to say to that, and I did not reply."

Mr. John Ayearst makes affidavit corroborating the magistrate as to the defendant having declined to accept an adjournment upon payment of $10 and as to his admission of a previous conviction. Except upon these two points the affidavit of the defendant as to what took place before and during his trial is uncontradicted.

The information returned with the papers refers to the former conviction of the defendant as a conviction for having "unlawfully sold intoxicating liquor." The conviction returned refers to the former conviction as a conviction for having "unlawfully sold intoxicating liquor without the license therefor by law required."

Counsel for the Crown contended that the conviction returned being upon its face regular and sufficient, the Court should not, on a motion for discharge under *habeas corpus*, go behind the conviction and consider the sufficiency of the evidence to support it. While it is established by many authorities that the Court will not upon such a motion rehear the case or weigh the evidence or sit in appeal, upon some of the same authorities it is clear that in this Province the Court will examine the depositions to see if there is any evidence to sustain the conviction, and if none is found, will discharge the prisoner, "since it is only reasonable that a person should not be detained in custody on a conviction which would be quashed if brought upon the Court in another form." Of these authorities it is sufficient to refer to *Regina* v. *St. Clair* (1900), 27 A.R. 308, 3 Can. Cr. Cas. 551, from which the sentence that I have quoted is taken. See also *Ex p. McEachern* (1896), 17 C.L.T. Occ.N. 18; *Rex* v. *Collette* (1905), 10 O.L.R. 718, 10 Can. Crim. Cas. 286.

Indeed our statute authorizing the issue of a writ of *certiorari* in aid of *habeas corpus* (R.S.O. 1897, ch. 83, sec. 5), states the object of conferring this right to be that the Court may view and consider

the evidence, depositions, conviction, and all the proceedings, to the end that the sufficiency thereof to warrant the confinement may be determined. Without authority, the very language of this enactment would seem to require, when papers have been returned pursuant to the *certiorari*, that the Court should look into them, and should, if it finds the conviction bad and insufficient to justify the commitment, or the evidence and depositions inadequate to sustain the conviction, order the discharge of the prisoner.

There does not appear to be any similar statutory provision in England, and there the return of a conviction regular in form and on its face valid and sufficient is, unless there be a question of jurisdiction, a conclusive answer to a motion for discharge on *habeas corpus*. The fact that no similar statutory power exists in the Canadian Supreme Court fully accounts for the decision in *In re Trepanier* (1885), 12 S.C.R. 111, 113.

(1) Robert Crawford, Esq., is police magistrate for the town of Brampton. H. H. Shaver, Esq., is police magistrate for the township of Toronto, in which the offence is charged to have been committed. The conviction recites that Mr. Crawford sat at the request of Mr. Shaver. I think Mr. Crawford's jurisdiction to try the offence charged not open to question: R.S.O. 1897, ch. 87, secs. 17, 27, and 30; *Rex* v. *Holmes* (1907), 12 Can. Cr. Cas. 235, 14 O.L.R. 124, 127; R.S.O. 1897, ch. 245, secs. 97, 101.

(2) I cannot regard the dating of the warrant of commitment as of the 7th October as anything more than a mere slip or clerical error. This certainly would not warrant the discharge of the prisoner held under the warrant. The error in date only appears upon examination of the conviction returned to the writ of *certiorari*, and is such that no Court should hesitate to permit it to be cured by amendment.

(3) Section 99 of the Liquor License Act (R.S.O. 1897, ch. 245) requires that "the justices shall in all cases reduce to writing the evidence of the witnesses examined before them, and shall read the same over to such witnesses, who shall sign the same." The Ontario Summary Convictions Act, R.S.O. 1897, ch. 90, prescribes that magistrates trying offences against Ontario statutes shall, as

to procedure and the conduct of the Court, comply with the requirements of the Dominion Criminal Code respecting summary convictions. By the Criminal Code, secs. 721 (3) and 683, the magistrate is required to put in writing the evidence taken by him.

For the first offence of selling liquor without a license the offender is liable to a maximum penalty of $100 and costs, and is liable to imprisonment only in default of payment; for a second offence he must, on conviction, be sentenced to four months' imprisonment: R.S.O. 1897, ch. 245, sec. 72. The proof of the prior conviction is, therefore, of the utmost importance when a charge is laid as for a second offence. In fact such proof is essential to the jurisdiction of the magistrate to impose imprisonment. Having regard to the requirements as to taking the evidence in writing, it was, I think, clearly the duty of the magistrate to put in writing, as part of the evidence in this case, the admission of the accused or the testimony of the inspector, Mr. Orr—whichever it was—upon which he found that the accused had been previously convicted of a similar offence. The return shews that he failed to do so. It would, in my opinion, be most unsafe to permit the evidence returned to be supplemented here by affidavits of the magistrate and the prosecutor as to what evidence was given or what admissions were made by the accused at the trial upon this vital matter. I must decline to do so.

If the magistrate proceeded as required by the statute (R.S.O. 1897, ch. 245, sec. 101), after finding the accused guilty upon the pending charge, he would have asked him "whether he was previously convicted as alleged in the information." In the information returned to the *certiorari* the allegation as to previous conviction is merely that the accused was formerly convicted before H. H. Shaver, Esq., police magistrate for the township of Toronto, of having on the 11th March, 1907, sold intoxicating liquor. If the defendant, upon being asked by the magistrate, did admit a conviction as alleged in the information, the offence so admitted might well have been something entirely different from selling without a license, because intoxicating liquor may be sold unlawfully by persons holding licenses. The magistrate had no personal knowledge of the prior conviction, as was the case in *Regina* v. *McGarry* (1900),

31 O.R. 486. The prior conviction had to be either admitted or proved before him by competent evidence. If, as his affidavit states, he asked the defendant "if he had previously, to wit, on the 30th day of March, 1907, been convicted of a similar offence," he departed from the statute, in that he inquired concerning an offence other and different from that alleged in the information. If he followed the statute and inquired concerning the prior conviction as alleged in the information, he obtained an admission which was entirely insufficient. This would make it still more dangerous to accept the magistrate's affidavit as to what transpired, in the absence of the record which the statute required him to make. There is no evidence returned to warrant the conviction for a second offence of selling intoxicating liquor without a license, which was essential to support the adjudication of imprisonment for four months. It follows that the defendant is entitled to his discharge upon this ground.

(4) It is not necessary to deal with this point, though had the return shewn evidence or an admission of a prior conviction for the like offence, I should have been inclined to accept the magistrate's statement as to stage of the proceedings at which such evidence or admission was given.

(5) Perhaps the most serious complaint of the defendant, however, is that he was not allowed fair or reasonable opportunity to make his defence. His statement as to the time at which he was served — his inability to procure the attendance of his own solicitor—his repeated requests for an adjournment—the refusal of the magistrate to grant him any time—stands uncontradicted. The offer made by the magistrate to grant an adjournment on payment of $10—even if not withdrawn, as might be inferred from the affidavit of the accused—scarcely requires consideration. The defendant was served on one afternoon in Streetsville to answer a charge on the next afternoon in Brampton. His solicitor was unavoidably absent. His proposed defence, if honest, required an analysis of the beverages he had sold to support it. These facts were all presented to the magistrate. Upon the opening of the trial the information which the defendant had been

summoned to answer, and which charged two offences, in contravention of sec. 710 (4) of the Code, was amended so as to charge one offence, and that on a date different from either of the dates named in the summons served. The defendant was then for the first time made aware of the actual charge which he was called upon to meet. Yet he was refused even an adjournment of a few hours, and was compelled to proceed with his trial without witnesses, without opportunity to present a defence, apparently substantial and *bonâ fide*, and defended by a counsel chosen not by himself but by the magistrate who tried him.

Section 715 of the Criminal Code enacts that "the person against whom the complaint is made or information laid shall be admitted to make his full answer and defence thereto and to have the witnesses examined and cross-examined by counsel, solicitor, or agent on his behalf." And sec. 104 of the Ontario Liquor License Act permits the amendment of informations before judgment only upon the terms that "if it appears that the defendant has been prejudiced by such amendment . . . the magistrate shall thereupon adjourn the hearing to some future day, unless the defendant waives such adjournment." The defendant was, in the circumstances of this case, entitled to a reasonable adjournment, not as of grace, but as of right—not upon terms, but unconditionally. To refuse to grant such adjournment was in fact and deed to deny him that opportunity "to make full answer and defence" which the Code says he shall have. The distinction between pressing on proceedings so that the defendant has no reasonable opportunity to make his defence and refusing to hear a defence which he offers to make is more apparent than real. I have rarely heard of magisterial authority being more arbitrarily and unfairly exercised than it appears to have been by the police magistrate in this case. His course was entirely contrary to the spirit which happily pervades the administration of justice in this country. While inclined, as far as possible, to disregard trivial and highly technical objections to convictions, and, even when obliged to quash, disposed to protect magistrates when they err through human frailty while honestly endeavouring to discharge their duties to the best of their ability,

superior courts may not countenance such a lack of fairness and such a departure from the rules of elementary justice as these proceedings disclose. To permit the confinement of the defendant to continue "would under the circumstances be contrary to natural justice, and to the principles of our laws:" *Regina* v. *Eli* (1886), 10 O.R. 727, 733.

An order will issue for the discharge of the prisoner from custody.

Order for discharge.

[SUPREME COURT OF NEW BRUNSWICK.]

BEFORE TUCK, C.J., AND HANINGTON, LANDRY AND McLEOD, JJ.

Ex parte ROY.

Destroying line fence—Fence placed across roadway long in public use—Title to land—Easement—Jurisdiction of magistrate ousted—County Court without jurisdiction to hear appeal—Certiorari notwithstanding entry of appeal—Cr. Code, 1902, *secs.* 507, 879, 887—*Rev. Cr. Code,* 1906, *secs.* 530, 749, 1122.

1. Where a justice of the peace proceeded with a charge of destroying a line fence although it appeared that the defendant pulled down the fence where it crossed a road long used by the public and that the title to the land was therefore in question and the magistrate's jurisdiction ousted, the right to certiorari is not taken away by an appeal to the county Court being entered under Rev. Cr. Code sec. 749 for the county Court had no jurisdiction to rehear a case in which there was no jurisdiction below.

2. The magistrate should have stopped the trial as soon as he found that the title to land was in question whether the dispute was as to the right or estate in the soil or merely as to a right of way or easement thereon.

ARGUED: April 10, 1907.
DECIDED: April 19, 1907.

An order *nisi* was granted in vacation by Tuck, C.J., to quash a conviction made by John E. O'Brien, a justice of the peace

for the County of Gloucester, against Peter L. Roy on an information under section 507 of the Code, for unlawfully destroying a part of a line fence between the lands of one Agnes Bateman and lands occupied by the defendant Roy.

At the trial it was objected that the justice had no jurisdiction, because the title to the land on which the part of the fence removed stood was in dispute. It appeared that the objection was well founded, and that there was a *bonâ fide* dispute as to the title to the land, but the justice disregarded the objection and made the conviction. The defendant appealed under section 879 of the Code to the Gloucester County Court, and the appeal was entered for hearing, and dismissed without considering the merits on the ground that it had not been perfected.

FREDERICTON, April 10, 1907.

Byrne shewed cause against the order *nisi*, contending that the defendant, having elected to take an appeal to the County Court under the statute, his remedy by *certiorari* was taken away by section 887 of the Code, that while he might have applied for a *certiorari* in the first instance, yet having made his election to appeal, he is concluded by the express terms of the section, and the question of jurisdiction or want of jurisdiction is not material. *In re Kelly*, 27 N.B.R. 553.

Gilbert, in support of the order. The section does not apply where there is no jurisdiction in the convicting justice or in the Court appealed to. The appeal under the Code is a re-trial: *Reg* v. *McDonald*, 12 Ont. R. 381. The County Court could not try the disputed title, and having no jurisdiction, had no cognizance of the matter. From a legal standpoint there never was an appeal.

MCLEOD, J.:—You chose that mode of redress, and if you made a mistake, must you not take the consequence?

Gilbert.—The only consequence is that the *certiorari* might, in the discretion of the Court, be refused on the ground of laches.

The *certiorari* is only taken away by section 887, when the appeal is to a Court authorized by the statute to hear and determine it. *Ex parte Cowan*, 9 Can. Cr. Cas. 454 also reported sub nom., *The King* v. *Delegarde*, 36 N.B.R. 503; *The King* v. *Forbes, Ex parte Dean*, 36 N.B.R. 580.

FREDERICTON, April 19, 1907.

The judgment of the Court was now delivered by

TUCK, C.J. (oral):—The defendant was convicted before a magistrate named O'Brien for tearing down a fence, in the County of Gloucester, and an application was made to me and I granted a rule for a *certiorari* and an order *nisi* returnable in term, which was argued before the Court. A number of grounds were taken before me and before the Court. I do not propose to deal with all these grounds, because I think there are two of them sufficient to quash this conviction, but the principal one is that the title to land came in question.

It appeared from the evidence that where the defendant tore down the fence it crossed a road that had been used as a highway and people travelled over it from time to time with their horses and teams. The defendant, who was charged and convicted, felt that the right which had been used by the public for so long a time—one witness, I think, said for thirty years—was being interfered with, and he pulled it down.

The matter came before a magistrate, and the point was taken before him that this was a highway and had been so used for a very long time, and that whether the contention was well founded or not, the question before the convicting magistrate involved the title to land and he had no jurisdiction.

There was an appeal, as provided for under the Act, to the judge of the County Court for the county where the offence was committed. All the papers necessary for the appeal were not before the Appeal Court. I do not know that any of the papers before the magistrate were before the County Court

Judge. At all events he dismissed the appeal without dealing with the merits.

It was argued that the matter, having been taken before the County Court on appeal this Court had no jurisdiction. We think differently from that.

If the magistrate, O'Brien, in the first instance had no jurisdiction to try the case, on the ground I have named, that the title to land came in question, that this was in fact and had been for years as proved a highway, whether an easement or a right in the soil it matters not, if honestly the title did come in question, we think the magistrate had no jurisdiction, and whether it came properly before the Judge of the County Court of Gloucester or not makes no difference, for he had no jurisdiction to rehear the case.

Originally there was no jurisdiction in the magistrate to try the case, and he ought not to have convicted, but should have stopped the moment he found the title was in question. Therefore we think the conviction should be quashed. That is the judgment of the Court.

Conviction quashed.

Note: *Certiorari notwithstanding abortive appeal—Rev. Cr. Code,* 1906, *sec.* 1122.

In *Ex parte Cowan,* 9 Can. Cr. Cas. 454, it was held by the Supreme Court of New Brunswick that where an appeal was taken from a summary conviction but lapsed because of the failure of the magistrate to return the conviction, a superior Court may afterwards issue a certiorari and quash the conviction notwithstanding the abortive appeal and section 887 of the Criminal Code, 1892, upon the ground that the magistrate had deprived the accused of a reasonable opportunity of making their defence and had acted collusively with the prosecutor. It was also held that in exceptional cases the Court will grant a certiorari although another mode of reviewing the conviction is provided by statute, and that this jurisdiction will be exer-

Note—*Continued.*

Certiorari notwithstanding abortive appeal—Rev. Cr. Code, 1906, *sec.* 1122.

cised where a gross perversion of justice has occurred through the misconduct of the magistrate.

The case of *The King* v. *Forbes, Ex parte Dean,* 36 N.B.R. 580, was a proceeding on the civil side upon a committal of a judgment debtor in an inferior Court. The Judge of the County Court of St. John, had in that case, made an order under 59 Vict. (N.B.) ch. 28, as amended by 61 Vict. ch. 28, committing the applicant to prison for three months, because, after his arrest in a civil suit in the Saint John city Court, he had made an appropriation of property in payment of another debt without paying the debt sued for. The Judge based the order upon evidence given in a former proceeding against the debtor, and not upon the hearing of any application for the order in question. The order did not shew on its face the grounds upon which it was issued. By 61 Vict. (N.B.) ch. 28, sec. 8, amending 59 Vict. ch. 28, an appeal is given to the Supreme Court from any order for imprisonment made under secs. 46, 48, 49, 51 and 53 respectively of 59 Vict. ch. 28. It was held by the Supreme Court of New Brunswick that the fact that the right to appeal is given by statute does not deprive the party of his right to a certiorari, and that the Court will grant the writ, if, in their opinion and discretion, the circumstances warrant it; also that an order for imprisonment made by a County Court Judge on the ground that the debtor, since his arrest, has divested himself of the means of paying the debt for which he is sued is bad if it does not shew on its face the grounds upon which it was issued, and that the mere payment of a *bonâ fide* debt, after he is sued, is not such a divesting of property as will render the debtor liable to imprisonment under the Act.

[SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE HUNTER, C.J.

THE KING v. AH SAM.

Disorderly house—Gaming house—Summary trial—"Disorderly house, house of ill-fame or bawdy house"—Revised Cr. Code 1906, *secs.* 228, 238(*j*), 774.

1. A gaming house is a "disorderly house" within the phrase "disorderly house, house of ill-fame or bawdy-house" as used in sec. 774 of the Revised Code.

2. A charge of keeping a gaming house may be the subject of a summary trial without the consent of the accused.

Ex parte Cook, 3 Can. Cr. Cas. 72, approved.

VANCOUVER, November 23, 1907.

HUNTER, C.J.:—These are applications to quash the convictions of four Chinamen for being keepers of a common gaming house, recorded by the police magistrate of Vancouver assuming to exercise jurisdiction under section 774 of the Code.

The chief ground, and the only ground on which I reserved judgment, was that the expression "disorderly house" in the section does not include gaming house, but is confined to houses of the same character as houses of ill-fame.

Judicial opinion is at variance on the subject: the Appeal Court in Quebec has adopted this view in *The Queen* v. *France*, 1 Can. Cr. Cas. 321, while it has been held by Drake, J., in *ex parte Cook*, 3 Can. Cr. Cas. 72, and by Craig, J., in Yukon that the phrase includes common gaming houses.

In my opinion the term "disorderly house" has acquired in criminal jurisprudence a definite legal meaning, and it includes any house to which persons resort for criminal or immoral purposes; and it is immaterial that the house is conducted quietly so as not to disturb the neighbours. *R.* v. *Rice*, 1 C.C.R. 21.

Section 228 of the Code singles out certain classes of disorderly houses, viz., bawdy houses, gaming houses, and betting houses, and provided that their keepers shall be liable upon conviction on indictment to a year's imprisonment; while other classes of disorderly houses, such as disorderly inns, places of entertainment, etc., are left to be dealt with by the common law; and I think that this is sufficient to shew that in the mind of the Legislature the phrase has the wide and general meaning alluded to.

There is nothing in the point that the phrase "keeping or being an inmate or habitual frequenter" is commonly associated with the idea of bawdy houses, as the words may be read distributively, while the argument that the language is redundant cuts both ways, as, from one point of view, "disorderly house" is unnecessary, while from the other point of view "houses of ill-fame or bawdy houses" is unnecessary. Applications dismissed.

Motions dismissed.

Farris, in support of application.
J. K. Kennedy, for the Crown.

[COUNTY COURT JUDGE'S CRIMINAL COURT, HALIFAX.]

BEFORE HIS HONOUR, W. B. WALLACE, COUNTY JUDGE.

THE KING v. SCHWAB.

Theft upon foreign ship in harbour—Foreign defendants—Jurisdiction—Harbour within headlands—A part of adjacent county—Consent of Governor-General to prosecution of Admiralty offences—Revised Cr. Code (1906), *sec.* 591.

1. A sea harbour enclosed within headlands such as the harbour of Halifax, is within the body of the adjacent county, and criminal offences

committed in such harbour even upon foreign ships are not within the jurisdiction of the Admiralty except in the special cases provided by statute.

2. A charge of theft by foreigners upon and from a foreign ship while lying in a harbour forming part of the body of the county may be prosecuted in the county without obtaining the leave of the Governor-General under sec. 591 of the Revised Criminal Code.

ARGUED: December 20, 1907.

DECIDED: December 21, 1907.

The three defendants, George Schwab, Joseph Fechant and Jean Ranton, were, in December, 1907, committed for trial by George H. Fielding, Esquire, stipendiary magistrate in and for the city of Halifax on a charge that they "did in the city of Halifax on the ninth day of November, in the year of our Lord one thousand nine hundred and seven, unlawfully steal from the French cable ship "Contre Admiral Conbet" four coils of copper wire of the value of $50 or thereabouts, the property of La Compagnie Francaise des Cable Telegraphiques, while said ship was at a wharf in Halifax, aforesaid.

The defendants elected, on December 19, 1907, to be tried on said charge in the County Court Judge's Criminal Court at Halifax, and were thereupon called upon to plead to said charge before Judge W. B. Wallace in said Court.

HALIFAX, N.S., December 20, 1907.

W. J. O'Hearn and *J. R. Johnston,* for the defendants moved to quash the charge, contending that as it was admitted that the defendants were subjects of France and that the alleged crime was committed on a French ship, the provisions of section 591 of the Code were applicable. No consent to these proceedings had been obtained from the Governor-General.

A. G. Morrison, K.C., and *J. P. Foley,* for the Attorney-General.

HALIFAX, N.S., December 21, 1907.

WALLACE, Co. J.:—In this case it is admitted that the leave of the Governor-General that the proceedings should be instituted has not been obtained. But is section 591 applicable to this case? That section refers exclusively to offences "committed within the jurisdiction of the Admiralty of England." The question in this case is whether an offence committed on the harbour of Halifax by subjects of France on a French ship is an offence "committed within the jurisdiction of the Admiralty of England."

At common law the jurisdiction of the Admiral's Court was confined to offences committed either on the open sea or on the coasts out of the body of a county. Williams' and Bruce's Admiralty Practice, p. 2, (note *e.*)

In the 13th year of Richard II., an Act was passed, presumably because the Admiralty was claiming a more extended jurisdiction. This Act is entitled, "An Act concerning what things the Admiral or his deputy shall meddle," and it provided "that the Admirals and their deputies shall not meddle from henceforth of anything done within the realm, but only of a thing done upon the sea." In the same reign, two years afterwards, another Act was passed containing the following provision, "It is declared, ordained and established that all manner of contracts, pleas and quarrels and all other things rising within the bodies of the counties as well as by land and by water and also of wreck of the sea, the Admiral's Court shall have no matter of cognizance, power nor jurisdiction, but all such manner of contracts, pleas and quarrels and all other things rising within the bodies of counties as well by land as by water shall be tried, determined and remedied by the laws of the land and not by the Admiral."

In another provision, that statute says, "Nevertheless of the death of a man done in great ships being in the main stream of great rivers only, beneath the bridges of the same rivers, nigh

to the sea, and in none other places of the same rivers, the Admiral shall have cognizance."

Apparently there was still difficulty in securing the obedience of the Admirals to these statutes, and, finally, an Act was passed in the reign of Henry IV. giving an action against the Admiral if he tried cases in violation of the statutes.

Referring, doubtless, to the effect of these enactments, there is the following language in 1 Burn's Justice at p. 42,—"It is plain that the Admiral could have no jurisdiction in any rivers or arms or creeks of the sea within the bodies of counties though within the flux and reflux of the tide, except in the particular instances of mayhem and homicide done in great rivers, beneath the bridges near the sea, which depended on Statute 15, Richard II., chapter 3. See also, to the same effect, Archbold Crim. Prac. pp. 39 and 540.

The only other legislation which has any relevancy to this inquiry is the Imperial Statute known as the "Territorial Waters Jurisdiction Act, 1878." (c. 73.)

It is obvious that the provisions of section 591 of the Canadian Code were taken originally from section 3 of this Imperial Statute. Section 2 of that statute is as follows:—

> "An offence committed by a person, whether he is or is not a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried and punished accordingly."

Then follows section 3 which requires the consent of one of Her Majesty's Principal Secretaries of State before proceedings for the trial and punishment of such offenders can be instituted.

What further jurisdiction has been conferred on the Admiral by these words of section 2 of this statute, "on the open sea within the territorial waters of Her Majesty's dominions?"

Section 7 of this statute thus defines the relevant words of section 2:—

> "'The territorial waters of Her Majesty's dominions' in reference to the sea, means such part of the sea adjacent to the coast of the United Kingdom, on the coast of some other part of Her Majesty's dominions, as is deemed by international law to be within the territorial sovereignty of Her Majesty; and for the purpose of any offence declared by this Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast measured from low-water mark shall be deemed to be open sea within the territorial waters of Her Majesty's dominions."

Two years previous to the passage of this statute the case of *The Queen* v. *Keyn*, 2 Ex. D. 63, was decided, and it is probable that the Territorial Waters Jurisdiction Act was enacted in consequence of that decision. The facts in that case were that the prisoner who was charged with manslaughter was a foreigner and in command of a foreign ship, the "Franconia," and the deceased was a passenger on board a British ship. The British ship when at a distance of one mile and nine-tenths of a mile S.S.E. from Dover pier-head, and, within two and a half miles from Dover beach, was run into by the "Franconia," in consequence of which the deceased was drowned.

It was held by a majority of the Judges on a Crown Case Reserved, that the Central Criminal Court had no jurisdiction to try the prisoner for the offence charged, but the judgment of Sir R. Phillimore in that case shews that the question as to jurisdiction over portions of the seas inclosed within headlands or contiguous shores was not considered by the Court. The language of that eminent Judge at page 71 recognizes a distinction between a "harbour" and the portion of the sea where the collision occurred.

In my opinion the Territorial Waters Jurisdiction Act does not confer jurisdiction upon the Admiralty of England where

the offence is committed in a harbour such as the harbour of Halifax, inclosed as it is within headlands, and I decide that the harbour of Halifax is within the body of the county of Halifax and that section 591 of the Code is not applicable to this case. The motion will be dismissed.

[The defendants thereupon pleaded "not guilty" and were tried by the County Court Judge and found guilty of the offence as charged.]

Defendants convicted.

Note: *Local jurisdiction in sea harbours between headlands.*

The above decision conforms with that of Sir William Young in *The Wavelet*, Young's Admiralty Decisions (Oxley), page 34. It was a collision case and the learned Judge found that the collision occurred "on the south-east side of George's Island, Halifax harbour, and therefore *within the body of this county.*"

See also *R.* v. *Bruce*, 2 Leach 1093, as to Admiralty jurisdiction in Milford Haven which is a part of the sea and yet landlocked and in the body of the County of Pembroke.

[COURT OF APPEAL FOR ONTARIO.]

BEFORE MOSS, C.J.O., AND OSLER, GARROW, MACLENNAN AND MEREDITH, JJ.A.

THE KING v. ARMSTRONG.

Evidence—Child of eleven years—Carnal knowledge—Testimony of child under oath—Instruction as to nature of oath—Rev. Cr. Code (1906), *sec.* 1003.

1. The fact that a girl of eleven years was instructed as to the nature of an oath only a few days before the trial is not sufficient ground for rejecting her testimony under oath if the magistrate is satisfied that she is competent to be sworn.

ARGUED: September 16, 1907.
DECIDED: September 23, 1907.

THIS was an application on behalf of the accused for leave to appeal and for an order requiring the police magistrate of Napanee to state a case for the opinion of the Court, under the circumstances stated in the judgment as to the evidence of the complainant, a child of eleven years.

TORONTO, September 16, 1907.

W. G. Wilson and *F. M. Field*, for the accused, contended that the real object of examining a witness of tender years was to ascertain if the Court could rely on the evidence as truthful, and that here the child was shewn to be most untruthful and apparently a moral pervert: *Rex* v. *Williams* (1835), 7 C. & P. 320; that there was no evidence of sufficient inquiry having been made to justify the magistrate taking the girl's evidence; and that there was no such corroboration as in the cases of *Rex* v. *Daun* (1906), 12 O.L.R. 227, 11 Can. Cr. Cas. 244; *The King* v. *Burr* (1906) 12 Can. Cr. Cas. 244, 13 O.L.R. 485. They also referred to *Queen* v. *Paul* (1890), 25 Q.B.D. 202, 206; *Queen* v. *Whitehead* (1866), L.R. 1 C.C.R. 33.

J. R. Cartwright, K.C., for the Crown, referred to Archbold's Queen's Bench Practice, 12th ed., p. 389; and pointed out that there was no need of corroboration: Criminal Code, sec. 1003, R.S.C., 1906, ch. 146.

TORONTO, September 23, 1907.

MOSS, C.J.O.:—Application on behalf of Armstrong for leave to appeal and for an order requiring the police magistrate of Napanee to state a case for the opinion of the Court.

The applicant was convicted on the charge, under sec. 301 of the Criminal Code, of carnally knowing a girl under the age of fourteen years not being his wife, and was sentenced to imprisonment for

seven years, the magistrate refusing the request of counsel for the applicant for a stated case.

The points on which counsel desired the case are, (1) whether it was sufficiently proved that the girl was not the applicant's wife, (2) whether the girl appeared sufficiently to understand the nature of an oath to justify the magistrate in receiving her testimony under oath, and (3) whether if her evidence should only have been received under sec. 1003 of the Criminal Code it was sufficiently corroborated as required by that section.

The application was with the consent of Mr. Cartwright, for the Crown, treated as the argument upon a case stated for the opinion of the Court upon the points mentioned.

During the argument we disposed of the first question adversely to the applicant, holding that upon the whole evidence it manifestly appeared that the girl was not his wife.

As to the second question no good reason appears for our saying that the magistrate was wrong in determining to receive the girl's evidence under oath. He states that having in compliance with the wish of counsel for the applicant examined the girl regarding her knowledge of the nature of an oath, he finds that she does understand it. There is nothing in what was stated as being the answers given by her to questions addressed to her by the magistrate and counsel for the applicant to indicate that she was incapable of understanding or did not understand. Though sadly depraved she is far from lacking intelligence, as her depositions shew. It appears that she has been attending school, and the handwriting of her signature to the depositions shews that she is not an inapt pupil in that branch. The fact that she had been instructed on the subject of the nature and meaning of an oath only a few days before the trial affords no sufficient ground for holding that her testimony was not to be admitted under oath.

Though all the Judges do not appear to have held precisely the same views with regard to the extent or means of instruction required in such cases, it seems quite settled that a child ignorant in the matter may be instructed for the purposes of a trial.

Whether the girl in this instance was competent or not was a

question for the magistrate to be determined when she was brought forward to testify. And being satisfied as to that he could not reject her testimony under oath.

This conclusion disposes of the third question, which could only arise in the event of the second question being answered favourably to the applicant's contention.

The conviction must be affirmed.

OSLER, GARROW and MACLAREN, JJ.A., concurred.

MEREDITH, J.A.:—No good reason has been advanced why "leave to appeal" should be granted, or in other words why the police magistrate should be required to state a case for the opinion of this Court "as if the question had been reserved:" sec. 744 of the Criminal Code.

The magistrate was of opinion that the girl, who was almost twelve years of age, was competent to give evidence under oath, and took her evidence accordingly; and also that if her testimony had been taken not under oath, it was "corroborated by some other material evidence:" sec. 1003 (*b*).

No serious fault can be found with either of such views.

There was no apparent reason for considering the girl incompetent, and an examination upon that question, disclosed nothing to shew that she was not competent. That examination was by no means an extended one, but it was enough to satisfy the magistrate's mind, and the accused can hardly complain that it was not of a more searching character, as he was given unrestricted liberty to cross-examine the girl, upon that question, and chose to make the cross-examination as brief as the magistrate's examination had been. In that, and throughout the trial, he was represented by competent counsel. There was, accordingly, no improper admission of evidence.

The case, therefore, was not one coming within the provision in sec. 1003 requiring corroboration; but, even if it had been, I would agree with the magistrate that there was some such corroboration as that section requires.

Whether the accused ought to have been convicted, upon such evidence, is not a question which this Court is required, or indeed has any right, to consider.

The application should not be granted.

Conviction affirmed.

[SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE IRVING, J., IN CHAMBERS.

THE KING v. BRIDGES.

Summary conviction—Sailor—Wilful disobedience—Canada Shipping Act, R.S.C. 1906, ch. 113, sec. 287—Disclosure of offence in warrant of commitment—Recital of unlawful disobedience insufficient—Rev. Cr. Code, sec. 1124.

1. It is essential in a conviction of a sailor under the Canada Shipping Act for continued wilful disobedience to state that the act charged was wilfully committed, and the omission to do so is fatal to the validity of the conviction.
2. The defect is not cured by stating the offence in the conviction to be "unlawful" disobedience.

DECIDED: April 30, 1907.

Motion for the discharge of five prisoners convicted under sub-section (*e*) of section 287, Canada Shipping Act, R.S.C. 1906, ch. 113. The men (five) were charged with "continued wilful disobedience to lawful commands," and a sixth man "wilful disobedience to any lawful command," and upon conviction they were committed to gaol. The warrants of commitment stated the offence for which the men were committed to be that they "did unlawfully continue to disobey the lawful commands of the master of the said vessel," and in the sixth

case "did unlawfully disobey the lawful commands of the master of the said vessel."

VICTORIA, April 30, 1907.

Lowe, for the motion. Wilfulness, which is an essential ingredient of the offence charged, is not disclosed, and the word unlawful by itself is not sufficient: see *The King* v. *Tupper* (1906), 11 Can. Cr. Cas. 199 and *Ex parte O'Shaughnessy* (1904), 8 Can. Cr. Cas. 136.

Morphy, contra.

IRVING, J., held that the conviction was bad and ordered the prisoners discharged.

Order accordingly.

[SUPREME COURT OF THE NORTH-WEST TERRITORIES.]

BEFORE SIFTON, C.J., AND WETMORE, SCOTT, HARVEY AND STUART, JJ.

THE KING v. CANADIAN PACIFIC RAILWAY CO.

Leave of Attorney-General—Condition precedent to prosecution under Lord's Day Act—Leave not proved before magistrate—Want of jurisdiction—New evidence not admitted on certiorari—Lord's Day Act, R.S.C. 1906, ch. 153, sec. 17.

1. The leave of the Attorney-General is a condition precedent to the commencement of a prosecution under the Lord's Day Act, and a magistrate has no jurisdiction to take the information unless leave has already been granted.
2. Evidence of such leave must appear in the proceedings before the magistrate, and in its absence the prosecutor will not be permitted upon a certiorari application to prove that leave had been granted before the information was laid.

DECIDED: July 17, 1907.

On 9th July, 1907, the defendants obtained a rule nisi, returnable on 16th July, before the full Court, to shew cause why a certiorari should not issue to remove a conviction made against the defendants by John Risk and A. E. C. McDonell, justices of the peace, at Claresholm, on 22nd May, 1907, for that the defendants did permit their employees at Claresholm to carry on part of the business of the corporation in their yards on Sunday 24th March, 1907, in violation of the provisions of an Act respecting the Lord's Day, and why the conviction should not be quashed.

The rule was obtained on some 11 grounds, the 5th of which was that the conviction and the proceedings did not properly shew that the leave of the Attorney-General for the Province of Alberta had been obtained before the prosecution was commenced.

R. B. Bennett, K.C., for defendants, upon this ground, cited *Abrahams* v. *The Queen,* 6 Can. S.C.R. 1; *Regina* v. *Bray,* 9 Cox C.C. 215; *Regina* v. *Heane,* 9 Cox C.C. 433; *Thorp* v. *Nall,* 66 L.J.Q.B. 248; *Re Gallard,* 65 L.J.Q.B. 199.

N. D. Beck, K.C., for the Attorney-General and the magistrates, took the preliminary objection that no notice had been given to the justices of the intended application for the summons, and also shewed cause.

CALGARY, July 17, 1907.

The judgment of the Court was delivered by

SIFTON, C.J.:—This is an application for a certiorari to bring up a conviction against the defendants made by John Risk and A. E. C. McDonell, justices of the peace, under the authority of section 15 of the Lord's Day Act, being the clause referring to breaches of the Act by corporations. The applica-

tion was made to this Court, in accordance with the Rules of this Court, without notice to the magistrates, and on their behalf objection was raised that the law in England as it was in 1870, which was made law in this country by the North-West Territories Act, provided for 6 days' notice of such an application. The Rules of this Court made in 1900, however, explicitly do away with the necessity of such notice, and those Rules were passed under the authority of section 533 of chapter 29, Dominion statutes of 1892, known as the Criminal Code, which expressly gives power "to make Rules not inconsistent with any statute of Canada." I therefore think the power to make such Rules is beyond question, and the application was properly made without notice.

In regard to the application itself, numerous grounds were stated and argued, but, in view of my opinion in regard to one of the points raised, it will be unnecessary to refer to the others.

Section 17 of the Lord's Day Act is as follows: "No action or prosecution for a violation of this Act shall be commenced without the leave of the Attorney-General for the province in which the offence is alleged to have been committed, nor after the expiration of 60 days from the time of the commission of the alleged offence."

The leave herein provided for is without question a condition precedent to the commencing of a prosecution, and is necessary before the magistrates would have jurisdiction to start the proceedings by taking an information. In the present case no proper evidence of such leave having been granted was given to the magistrate. This was practically admitted by counsel for the magistrates, who offered an affidavit, to which was affixed a copy of a letter written by the Deputy Attorney-General at Edmonton to the Assistant Commissioner of Police at Regina, by which he assumed to give the leave of the Attorney-General for the bringing of this and other proceedings. I have serious doubts as to whether the Deputy Attorney-General could give leave in such a roundabout manner, provided he is authorized

to give it at all, which is open to question; but it is not necessary to decide that question, as there is no doubt that this letter was not brought to the attention of the magistrates, and, as the question is one of jurisdiction on the part of the magistrates, new evidence cannot be taken by this Court to bolster up the lack of evidence before the magistrates, and therefore the affidavit and exhibits are inadmissible for the purpose for which they were tendered.

My opinion, therefore, is that a certiorari should issue to bring up the conviction, and that, on such certiorari being returned with the conviction, the conviction should be quashed.

Conviction quashed.

[SUPREME COURT OF NEW BRUNSWICK.]

BEFORE TUCK, C.J., AND HANINGTON, LANDRY, BARKER, GREGORY AND McLEOD, JJ.

Ex parte TOMPKINS.

Summary conviction—Information—Defendant not appearing to summons—Amendment of information—Changing date of alleged offence—Illegal sale of liquor—Revised Cr. Code (1906), *secs.* 718, 724.

1. Where the day of the week and the day of the month mentioned as the return day in a summons issued by a magistrate do not conform, the summons is not invalid as for an impossible day but the day of the month governs.
2. Although the defendant has failed to appear after summons in a summary conviction matter, the information may be amended to correct the date of the offence but not to charge a different offence.
3. A charge of illegally selling liquor on a date specified is properly amended to charge the illegal sale as of a date four days earlier, and such change of date does not necessarily make it a charge of a different offence.

Ex parte Doherty, 1 Can. Cr. Cas. 84, distinguished.

ARGUED: April 20, 1906.

DECIDED: April 21, 1906.

Motion for a rule absolute for a *certiorari* and for a rule *nisi* to quash a conviction made by Hector Nadeau, a justice of the peace for the county of Madawaska, on the 8th day of February, 1906, against Samuel Tompkins for unlawfully selling liquor on the 20th of November, 1905, without the license required by the Liquor License Act (Consol. Stat. 1903, ch. 22).

The grounds on which the application was based are indicated in the judgment of the Court.

Barry, K.C., for the motion.

FREDERICTON, April 21, 1906.

TUCK, C.J.:— This was a complaint under the Liquor License Act (ch. 22, Consol. Stat. 1903) under which Tompkins was convicted of selling without license.

Two points were taken in the case before the Court; the first was that the day upon which Tompkins was summoned to attend the Court was an impossible day. The summons called upon him to appear on Tuesday the 8th of February, 1906, when in reality Thursday was the 8th of February. I am not sure, but my impression is that it has been decided that in a case like this the party summoned is bound to appear on the day of the month stated in the summons, disregarding the day of the week, if he has any answer to make to the charge against him. He did not appear on the 8th and the magistrate convicted him, and we think rightly.

There was one other point in the case, and that was that the defendant was charged with having sold intoxicating liquor without a license on the 24th of November, 1905, and when it came to trial he did not appear and the magistrate amended the information from a charge for selling on the 24th to a charge

for selling on the 20th. The Court is of opinion the magistrate had a right to do that and enter a conviction for a sale on the amended information: *Ex parte Doherty*, 33 N.B.R. 15, 1 Can. Cr. Cas. 84, was relied upon to obtain the rule; that was a different case; there the charge was for selling and the information was amended to a charge for keeping for sale which was a different offence. The majority of the Court (Mr. Justice Landry and myself dissenting), held the defendant could not be convicted on the amended charge. The present case is simply that the information was changed from selling on the 24th to selling on the 20th, and, of course, it was the same offence.

We think that the magistrate had the power to make the amendment, and the motion for a rule absolute for a *certiorari* and a rule *nisi* to quash is refused.

HANINGTON, LANDRY, BARKER AND GREGORY, JJ. concurred.

MCLEOD, J.:—While I do not dissent from the judgment in this case, yet upon the latter of the two grounds taken I certainly have very grave doubt. The party was charged with the offence of selling liquor on the 24th of November, 1905, without the license required by law. There may have been reasons why he did not attend before the magistrate to answer the charge of selling on the 24th, and it was not necessary for him to attend. In his absence they changed the information, and charged him with selling on the 20th. He had no notice whatever that he was to be tried for an offence committed on the 20th, and it seems to me open to very grave doubt whether a man can be charged with having committed an offence, and, if he does not appear in answer to the charge, the information can be amended tó a charge for selling on some other date, and he, without having any notice whatever, can be convicted on the amended charge. Expressing this doubt I will not dissent.

Rule refused.

[SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE MARTIN, J., AND A JURY AT THE CLINTON ASSIZES.

THE KING v. FORD.

Robbery—Theft—Mens rea—Forcible re-taking of money lost in card game—Bonâ fide belief of cheating at game—Revised Cr. Code, secs. 442, 445, 447.

1. Where the loser in a card game was informed shortly after its termination that he had been cheated and thereupon, in the bonâ fide belief (whether mistaken or not) that such was the case, assaulted the winner and by force took from him a part of the money won in the game, such assault and re-taking does not constitute theft or robbery.
2. Under such circumstances the accused may properly be convicted of common assault.

ARGUED: May 24, 1907.

DECIDED: May 24, 1907.

The defendants, Ford and Armstrong, came up for trial on a charge of robbery. The evidence upon the trial shewed that the prisoner, Ford, and the complainant witness, Lane, had spent the preceding night in gambling, and in the course of the game, as was alleged, Lane had cheated at cards, as a result of which Lane won over $600 from the accused Ford. After the termination of the game it was suggested to Ford that he had been cheated in the game and thereupon, assisted by Armstrong, he proceeded, between 7 and 8 in the morning, to the place where the complainant was encamped, assaulted him and took from him a large part of the money lost in the game, but left with him designedly a considerable amount in cash and securities, which he could also have taken if so disposed. Upon the trial before Martin, J., after the above facts and others had appeared in evidence,

Howay, for the prisoner, asked the Court to charge the jury that if they were satisfied that the accused believed that the complainant, contrary to section 442 of the Revised Code, had deprived him of his money by cheating him in the game, and in that belief had assaulted him for the purpose of recovering said money won through such cheating, the crime of robbery had not been committed. The fact that the accused Ford took care to leave with the complainant a substantial balance in his favour on the accounts between them, negatived the intent to rob: Archbold's Criminal Pleading, 22nd ed., 410-14; *Rex* v. *Holloway* (1833), 5 C. & P. 524; Russell on Crimes, 6th ed., vol. 2, p. 85.

Maclean, K.C., D.A.-G., for the Crown: Even if this were so, the jury may still convict for common assault at least.

CLINTON, B.C., May 24, 1907.

MARTIN, J., instructed the jury that if on all the facts before them they were satisfied that both the accused acted in the *bona fide* belief, even though mistaken, that Ford had been swindled out of his money in the manner alleged, and that they were entitled to recover it, and did commit the assault and retake the money, or a portion of it, in that sole and *bona fide* belief (which question the jury would determine by a consideration of the facts, and primarily in this case by certain actions of the accused at the time of the assault, which the learned Judge reviewed), then they would be justified in acquitting the accused of the charge of robbery, though it was open to them on the facts to convict on a charge of assault, aggravated or common, according to the view they took thereof.

Verdict of common assault.

Note: *Theft—Mens rea—Intent—Rev. Cr. Code* (1906) *sec.* 347.

The present statutory definition of theft as contained in sections 347 and 348 of the Code is mainly a declaration of the common law.

In Archbold's Criminal Pleading, 22nd ed., pages 409 and 410, it is said that in all cases of larceny, the questions whether the defendant took the goods knowingly or by mistake—whether he took them *bonâ fide* under a claim of right, or otherwise—and whether he took them with an intent to return them to the owner, or fraudulently, with an intent to deprive the owner of them altogether, and to appropriate or convert them to his own use—are questions entirely for the consideration of the jury, to be determined by them upon a view of the particular facts of the case. *R.* v. *Farnborough,* [1895] 2 Q.B. 484, 64 L.J. (M.C.) 270. The taking and carrying away must be *felonious,* that is, done *animo furandi;* or, as the civil law expresses it, *lucri causâ;* 4 Bl. Com. 232. This, indeed, is not very definite; but larceny (at common law) may correctly be defined thus: the wrongful or fraudulent taking and carrying away the personal goods of another, from any place, with a felonious intent to convert them to the taker's own use, and make them permanently his own property, without the consent of the owner; 2 East, P.C., p. 553; the word "felonious" being explained to mean that there is no colour of right to excuse the act; and the "intent" being to deprive the owner, not temporarily, but permanently of his property. *R.* v. *Thurborn,* 1 Den. 388; 2 C. & K. 831; 18 L.J. (M.C.) 140: *R.* v. *Guernsey,* 1 F. & F. 394.

So, if a man having done work upon a chattel, returns it to the owner, and, a dispute afterwards arising between him and the owner as to the price to be paid for the work, he seizes and carries off the chattel, against the will of the owner honestly intending to hold it as a security for the amount which he alleges to be due to him, this is no felony, although, in fact, nothing may be due to him. *R.* v. *Wade,* 11 Cox 549, Blackburn, J.

A creditor who violently assaults his debtor, and so forces him then and there to pay him his debt, cannot be convicted of robbery, there being no felonious intent. *R.* v. *Hemmings,* 4 F. & F. 50. If a servant take his master's horse without his

Note—*Continued.*

Theft—Mens rea—Intent—Rev. Cr. Code (1906) *sec.* 347.

knowledge, and bring him home again; if a man take his neighbour's plough that is left in the field, and use it upon his own land, and then return it; these may be trespasses, but are not felonies. 1 Hale 599, because the returning the thing taken sufficiently evinces that the party, when he took it, had no intention to deprive the owner of it, or to convert it to his own use. Returning the goods, however, can be considered merely as evidence of the defendant's intention when he took them; for if it appear that he took them originally with the intent of depriving the owner of them, and of appropriating them to his own use, his afterwards returning them will not purge the offence. See 1 Hawk, ch. 34, sec. 2; 1 Hale 533.

In *R.* v. *Phillips*, 2 East P.C. 662, 663, it was proved that the defendants took two horses out of the prosecutor's stable at night without his leave, and having ridden them about thirty miles, left them at an inn, desiring care to be taken of them, and saying that they should return in three hours; the defendants were taken on the same day at the distance of fourteen miles from the inn, walking in a direction from it: the jury found the defendants guilty, but at the same time found specially that the defendants meant merely to ride the horses the thirty miles, and to leave them there, without an intention to return for them, or otherwise dispose of them; and ten of the Judges held that this was no felony, as there was no intention in the prisoners to change the property, or make it their own. So, where the servant of a tanner took out of his master's warehouse dressed skins of leather, with intent to bring them in and charge them as his own work (which they were not), and to get paid by his master for them, this was held to be no larceny. *R.* v. *Holloway*, 1 Den. 370; 2 C. & K. 942; 18 L.J. (M. C.) 60.

The prisoner's goods having been seized under warrants of execution of a county court, and being in possession of the bailiff, the prisoner, with intent to deprive the bailiff of his authority, and so defeat the execution, forcibly took the warrants from him. On these facts it was held that the prisoner was not guilty of larceny of the warrants, but that he was guilty of taking the warrants for a fraudulent purpose within the meaning of 24 & 25 Vict. ch. 96, sec. 30. *R.* v. *Bailey*, L.R., 1 C.C.R. 347.

Note—*Continued.*

Theft—Mens rea—Intent—Rev. Cr. Code (1906) *sec.* 347.

Where the defendant was supplied by his master with pig-iron to be put into a furnace to be melted, being paid according to the weight of the metal which ran out of the furnace into bars, and he put in also other iron belonging to his master, whereby the weight of the melted iron, being thus increased, he gained a larger remuneration, it was held that if he did this with the felonious intent of converting the iron to a purpose for his own profit, it was a larceny. *R.* v. *Richards*, 1 C. & K. 532. So, the secreting and destroying of a post-letter in the hope of suppressing inquiries supposed by the defendant to be made in it respecting her character, was held to be larceny. *R.* v. *Jones*, 1 Den. 188; 2 C. & K. 236.

[SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE CLEMENT, J.

Re JOHNSTON.

Extradition—Obtaining money by false pretenses—Falsifying workmen's time-roll—Revised Cr. Code (1906), *sec.* 405.

1. Where the basis of a charge of extradition is an alleged falsification of a written document, either the document itself must be produced or a foundation must be laid for secondary evidence of its contents; and a commitment for extradition is invalid as not disclosing a *prima facie* case unless this has been done.

Re Harsha, No. 1 (1906), 10 Can. Cr. Cas. 433, approved.

ARGUED: August 9, 1907.
DECIDED: August 12, 1907.

Application for a writ of habeas corpus in an extradition proceeding.

A charge of obtaining money under false pretences was laid against R. C. Johnston by the prosecuting attorney of Skagit County at Mount Vernon, Washington, and upon that charge a warrant was issued. The false pretence alleged was that John-

ston in his capacity as train master on the Great Northern Railway, in collusion with the white foreman of one of the track gangs and a Japanese foreman or bookman of the same gang (the gang being composed of whites and Japanese), falsified the time rolls by means of adding fictitious Japanese names thereto, the moneys paid by the railway in respect of these fictitious names on the time rolls being collected by the Japanese foreman and divided amongst the three participants.

The warrant issued under the Extradition Act was based on the Skagit County warrant and Johnston was apprehended in British Columbia. At the hearing evidence was given by the white foreman amounting to a confession, and by the Japanese foreman in the shape of an affidavit (amounting also to a confession) who had been arrested in Mount Vernon and was in custody there. The time rolls shewing the dummies were not produced at the hearing, but they were being sent from St. Paul. Cane, Co.J., who took the hearing, held that the evidence was sufficient for a committal without the time rolls and committed the accused for extradition.

VANCOUVER, August 9, 1907.

Farris, for the prisoner.
Burns, for the State of Washington.

VANCOUVER, August 12, 1907.

CLEMENT, J.:—Various grounds were urged in support of this motion, but I find it necessary to consider but the one. The basis of the charge being a false pretence upon which money was obtained from the company, and that false pretence being contained in a written document, the document itself must be produced in order to make out even a primâ facie case, unless of course a foundation is laid for secondary evidence of its contents, which has not been done here. *Re Harsha* (No. 1) (1906), 10 Can. Cr. Cas. 433, commends itself to me—if I may say so—as good law, and it covers this case. The prisoner must, I think, be discharged.

Application allowed.

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